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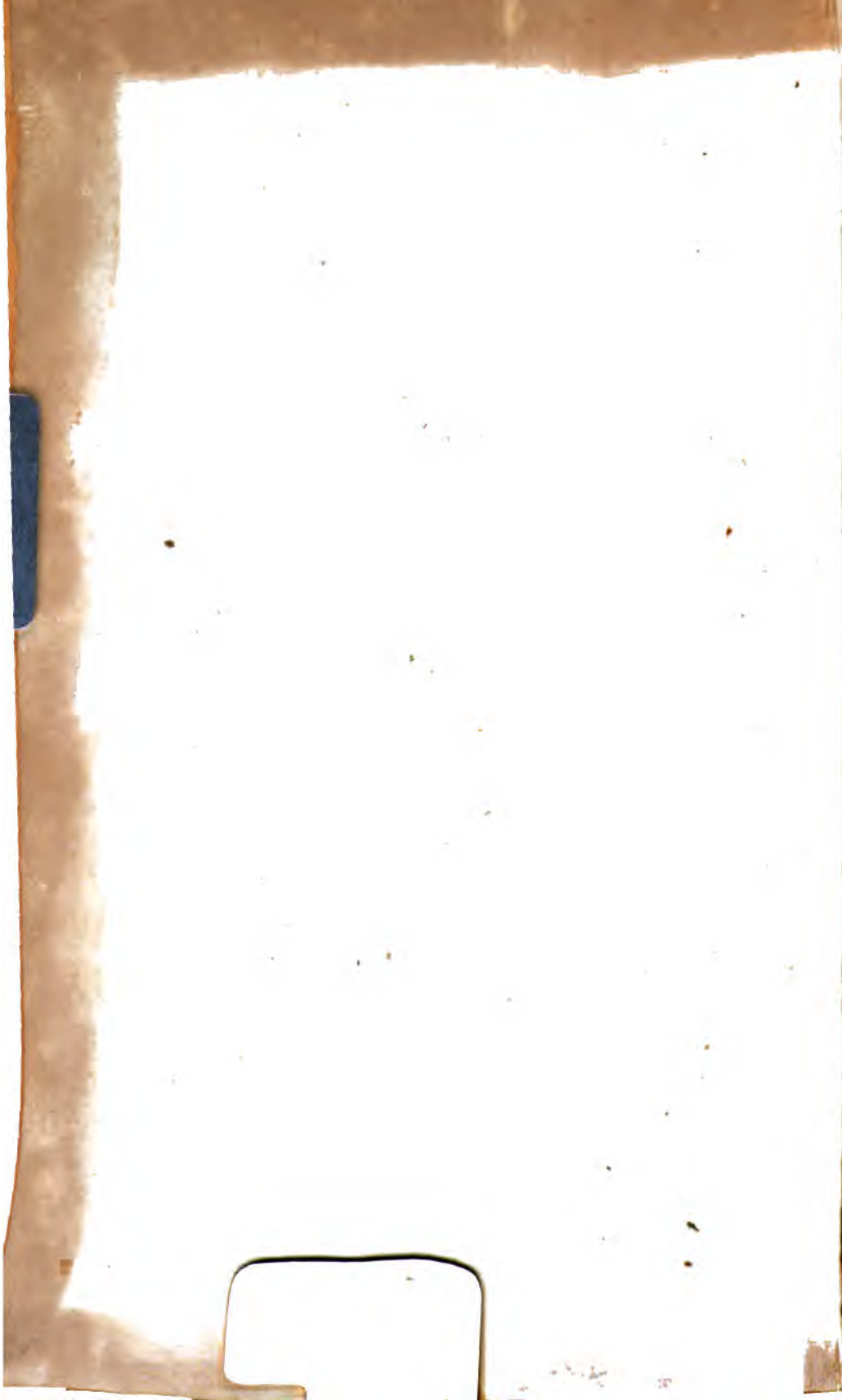
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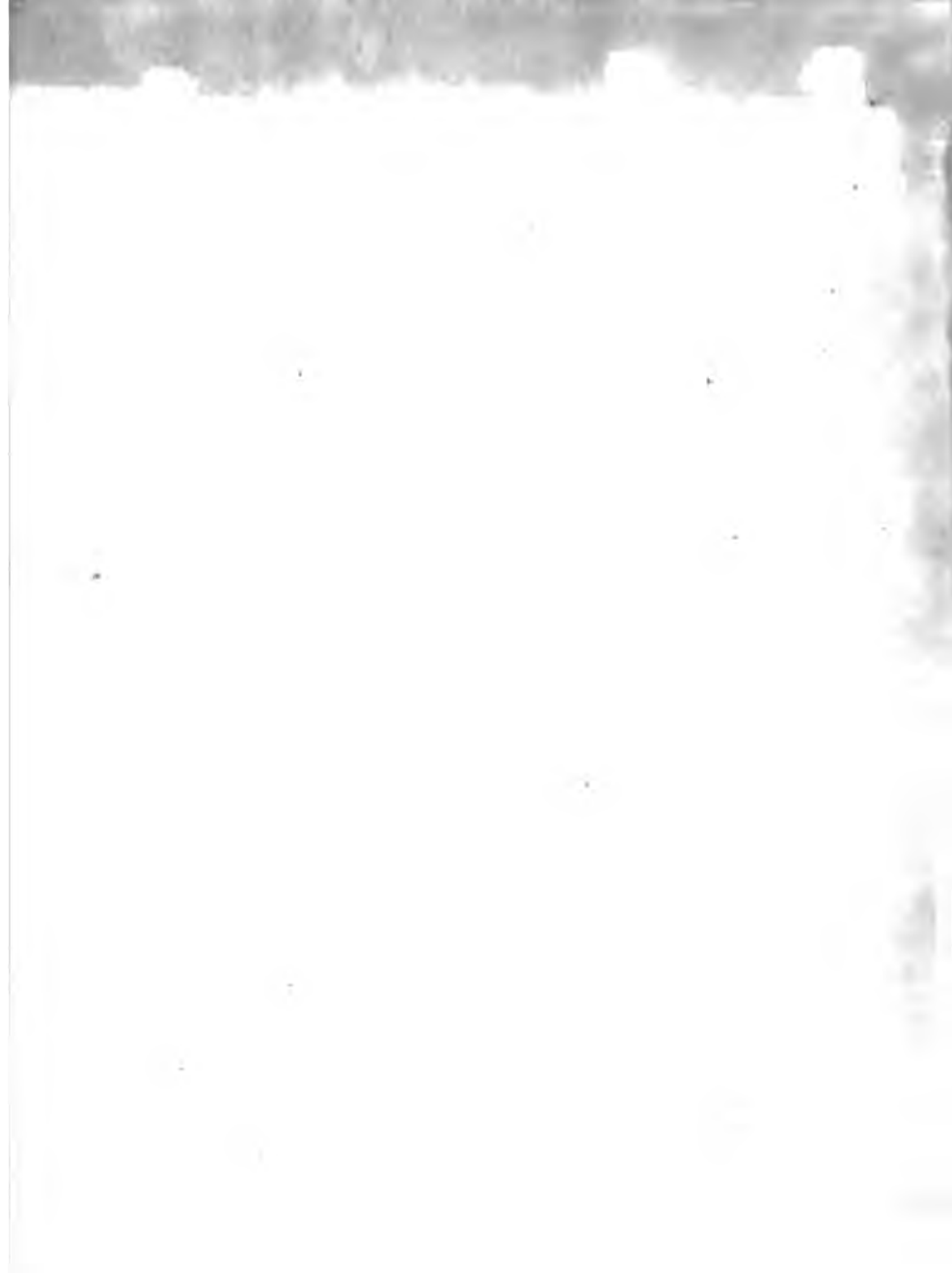
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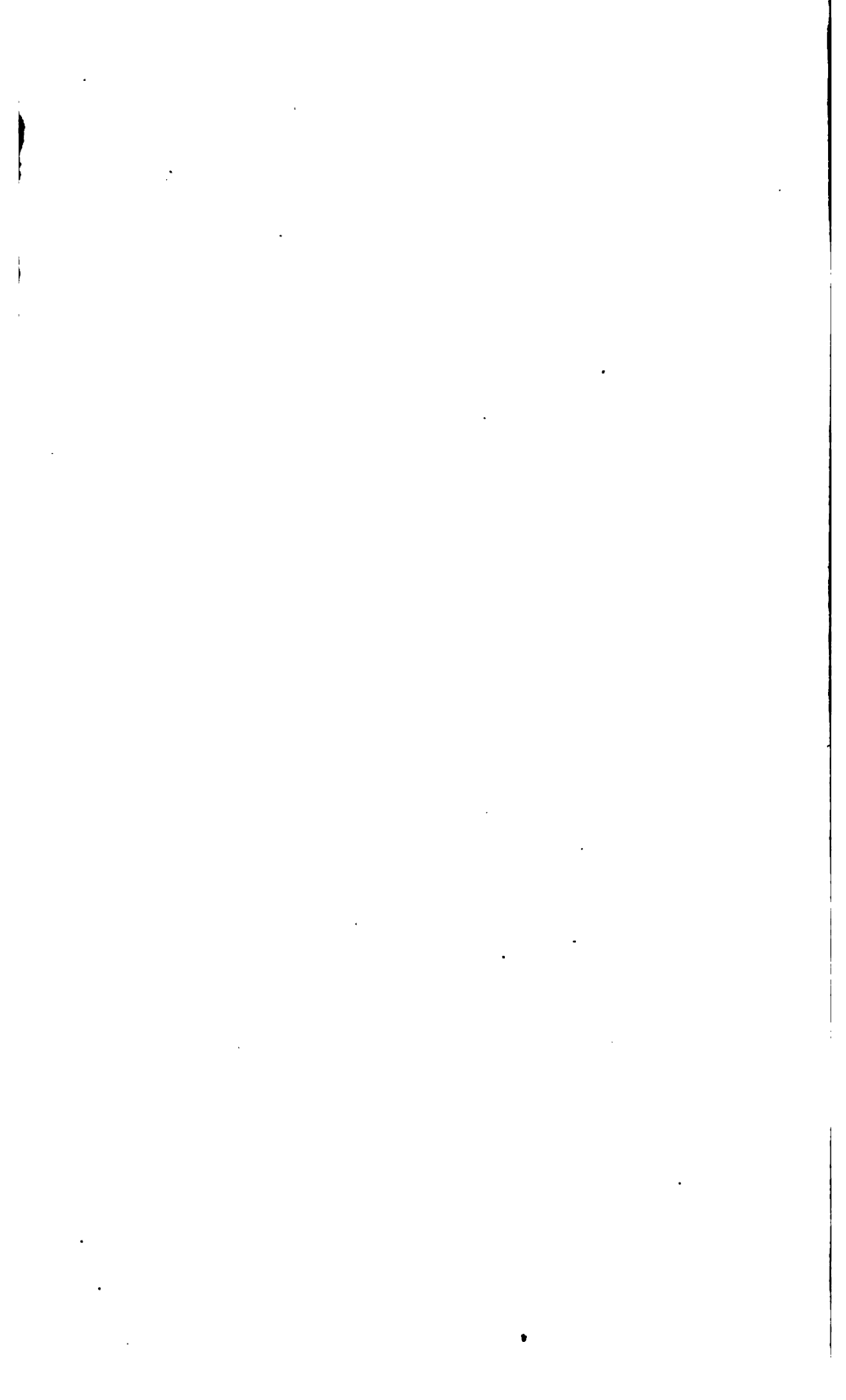
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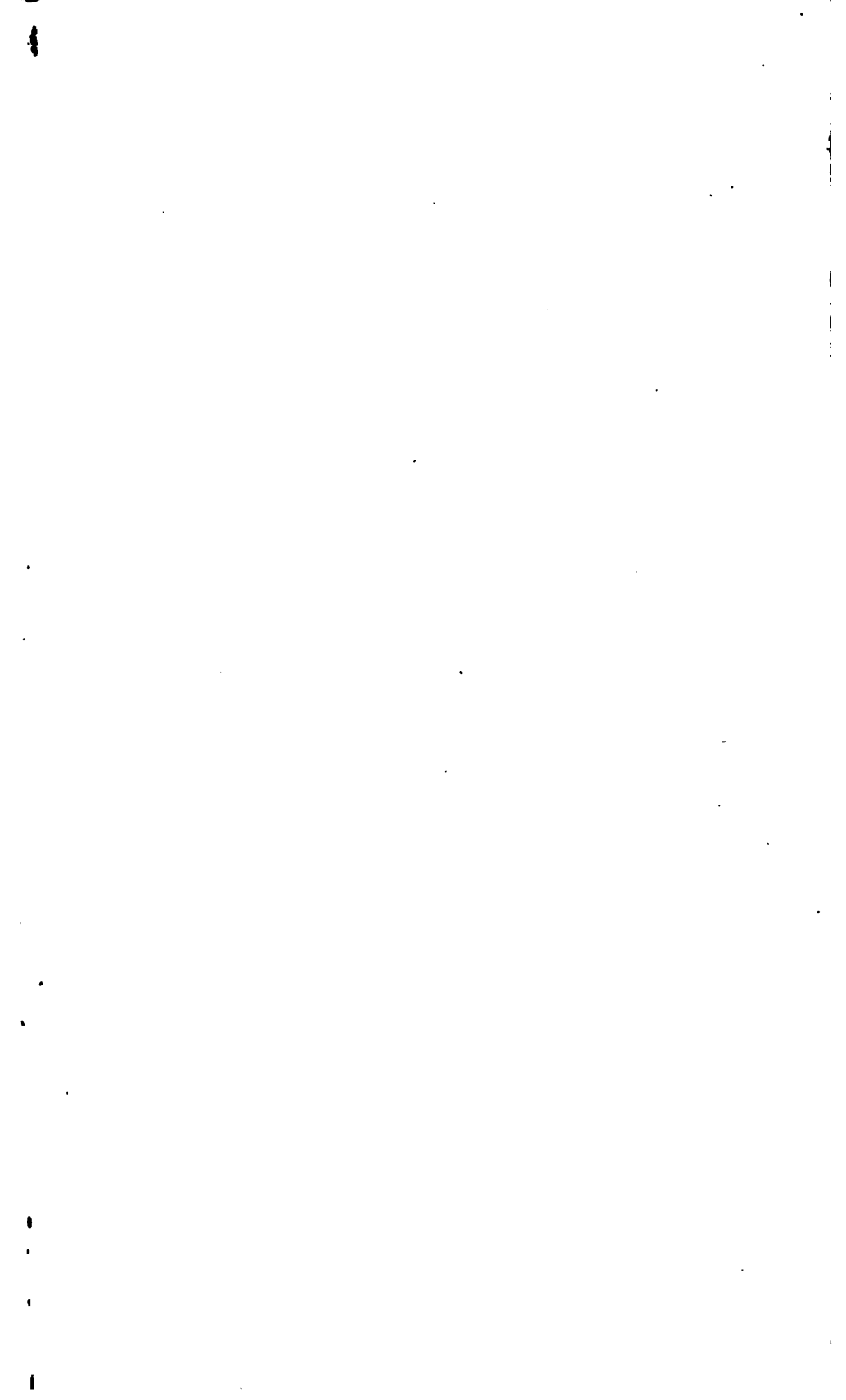
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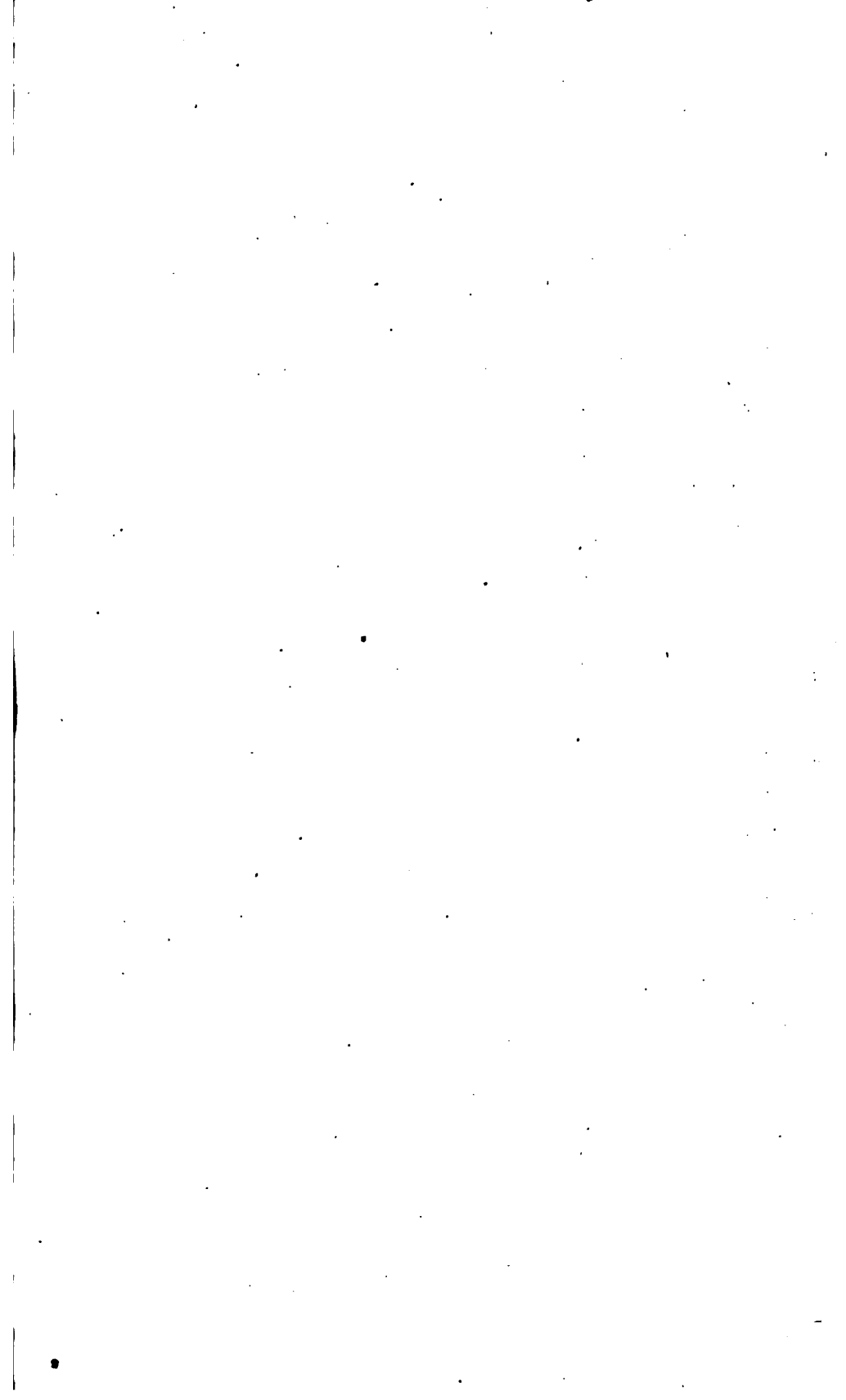












REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK,

WITH
Copious Notes and References.

~~~~~  
BY GEORGE CAINES,  
COUNSELLOR AT LAW.  
~~~~~

THIRD EDITION,
CAREFULLY REVISED AND CORRECTED,

WITH
ADDITIONAL NOTES EMBRACING THE MORE RECENT DECISIONS.

BY WILLIAM G. BANKS,
COUNSELLOR AT LAW.

IN THREE VOLUMES.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN MAY TERM, IN THE TWENTY-EIGHTH YEAR OF OUR INDEPENDENCE.

WILLIAMS against SMITH.

To constitute a blockade, so as to affect a policy of insurance by a violation of it, there must be an actual existing force before the port, at the time it is entered. The *animus revertendi* of an obsidiary fleet does not continue the blockade, nor is the entry of a neuter, after being warned, a breach of his neutrality, if the blockading force be not before the port.(a) If a vessel be driven into a port of necessity, and a pestilential disorder break out, which renders it impossible for her to pursue her voyage, it is a loss within the perils of a policy.

THIS was an action on a valued policy, on the cargo of the American ship Prosper, from New York to Algiers, with liberty to touch at Cadiz. Premium 15 per cent. with

(a) The words of the court in pronouncing their judgment in this case, will certainly warrant the latitude of the principle laid down in the margin; but a late decision has reduced the law on this point within more reasonable bounds. It has been subsequently ruled, that an accidental dispersion of an obsidiary fleet does not, where the *animus revertendi* is preserved, raise a blockade, though there be not any force before the port invested; but that withdrawing the blockading squadron, for other hostile purposes, however temporary, does. *Radcliff v. Un. Ins. Co.* 7 Johns. Rep. 38. See also the same case, 9 Johns. Rep. 277.

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the usual clause against contraband, but in the margin was written "on naval stores." The cause came before the court on a motion for a new trial.

The case read, at the argument, occupied the court for an hour; but it is conceived the important facts which it presented are only these: The plaintiff was owner and master of the vessel, and part owner and consignee of the cargo. For this he had signed a bill of lading to deliver it at Algiers to his associate, Sullivan, or his assigns, &c. The vessel sailed on the voyage insured, on the 20th of May, 1800 with a cargo, principally of naval stores. On the 18th of July she experienced severe weather, that continued until the 16th. In this time she labored so much as to work all the oakum out of the quick work on her starboard side, and her bulwark being stove in, cutwater started, and plank shears split fore and aft, she made so much water as to be under the necessity of pumping every quarter of an hour, bringing up great quantities of

[*2] *tar, which occasionally choked the pumps to such a degree, as to require taking out and clearing the boxes. In addition to this, one pair of the main shrouds were carried away, and although the leak was in some degree stopped with swabs, still they were obliged to keep the pumps agoing. Having, however, moderate and fair winds, they were enabled to proceed, notwithstanding two men were, from sickness, rendered unfit for duty. On the 3d of July the Prosper was boarded, off Cadiz, (according to the testimony of the mate,) by a British 74; but according to that of two others, by a frigate, who endorsed her papers, and forbade her entering Cadiz, as it was blockaded. This notice was, in the cross examination of one M'Cann, a witness in Spain, said to have been mentioned to him by Captain Williams as a warning from the English fleet. On the fifth, the wind coming ahead, and the captain then discovering a pair of the larboard main shrouds carried away, determined, after consultation with the mate, to bear away for Cadiz, for the preservation of

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vessel and crew, being unable to beat against contrary winds. In consequence of this resolution, they put about, and arrived the same day at Cadiz, though the same wind was fair for St. Lucar's and St. Mary's, which are both seaports, at which repairs may be made, and only a few miles distant from Cadiz, but bar-harbors requiring a pilot, though less difficult of entrance than Cadiz. At the time of passing these ports, no pilot came off, the vessel not laying too for the purpose of taking one on board; nor was it clear that the blockading fleet, which during the years 1797, 1798, and 1799, had remained at anchor off Cadiz, was at this period actually before that place, having sailed in pursuit of a French fleet, leaving however, three or four frigates to continue the blockade; a force sufficient to render the entrance dangerous to merchant vessels, though the Spanish armament, then in Cadiz, consisted of 20 or 30 sail of the line. Notwithstanding this, from the evidence of a Mr. Mumford, who had, about the middle of July, been warned by one of those frigates not to enter Cadiz, there was a presumption, that even then the British squadron was at Gibraltar, about 14 leagues distant; and, on an appearance of an attack from the British ships, the Prosper was herself, while at Cadiz, *ordered [*3] farther up the harbor. Her leaks continuing, the captain, on the 16th of July, applied to the consul of the United States to direct a survey on his vessel and cargo. This accordingly took place, under the inspection of three American captains, who certified that the ship, from her leaky state, wanted repairs, for which purpose it would be necessary that she should be sent to a proper place to unload her cargo, much of that part consisting of tar being pumped up. In consequence of this, more than half of her lading was taken out, and the vessel herself moved up to Putnall, the usual place for repairing, as the bay of Cadiz was too rough for what she required. Whilst there, a species of epidemic fever broke out, which prevented all business, and caused even the custom-house to be shut up,

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so that it was impossible to obtain permits for taking the cargo from where it had been landed and entered for exportation. Hoping for a speedy removal of these impediments to her departure, the captain of the *Prosper*, after completing his repairs, and paying for them by a sale of part of his cargo, dropped down to Cadiz, but was, on the 14th of October, in a tremendous levanter, obliged to cut his cables and drive to sea. The second day of the tempest, which continued for three in the utmost violence, they discovered three feet water in the hold; and though the storm then abated, they could not return to Cadiz until the 24th. The injury they sustained was increased, by having knocked a hole in the side of the vessel on some rocks; and from the part of the pitch, which they had on board, having been floated by the water in the vessel, so as, according to the mate, to dash to pieces many of the barrels, the contents of which was necessarily lost. On regaining Cadiz, another survey was held, by the return of which, it appeared, that the cargo both on shore and on board, from the heat of the climate and violence of the gale, was deteriorated more than one half, of its original value. It also was in evidence, that the whole would not have produced enough to outfit and repair the ship for the completion of her voyage, her provisions and stores having been expended in maintenance of the crew, who had been retained to take care of her cargo.

[*4] To obtain money on bottomry was impossible. *On the 15th of November, Williams formally abandoned the vessel and cargo to the underwriters, and made a regular entry of it in the office of the Consul for the United States. On the 29th, the *Prosper* was attached by an order from the Royal Consulado of the city of Cadiz, for money due on a bottomry bond given to a Mr. Masack, of Amsterdam, by one Lewis Gurnier, on the procurement of Cassimir Delavigne & Co. of New York, from whom the ship was fairly bought by the plaintiff. Under this attachment, the vessel was sold for 1,925 dollars—her

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price, by the bill of sale, was 8,500 dollars; for what amount she was bottomed did not appear.(a) The crew consisted of the master, mate, 4 hands, a cook, and a boy, which appeared was such a crew as Americans, who generally sail with fewer hands than other nations, might go to sea with; though, for a vessel of the same tonnage as the Prosper, the witness who testified on this point, said he would not choose to do it, notwithstanding one had, with a similar number, come from Europe to the United States. Upon these facts, the learned judge before whom the cause was tried, charged, with respect to the blockade, that if the jury were of opinion Cadiz was blockaded, by a competent force, and the ship in question not forced by necessity to enter that port, and nevertheless did enter it after notice, their verdict must be for the defendant.

2. That if they were of opinion the crew was not competent for the voyage, they would find in the same manner.

3. That if the seizure under the bottomry bond was made before the abandonment at Cadiz, the defendant would also be entitled to a verdict; but if the abandonment was previous to the seizure, the plaintiff would have a right to recover for a total loss.

4. That if the cargo was injured exceeding a moiety of its value at the time of abandonment, the right of the plaintiff would be the same.

5. That any damages which arose in consequence of the fever at Cadiz, were within the perils of the policy.

6. That if the jury should find in favor of the defendant, on either of the two first points, it would be sufficient, and in that case it would be unnecessary to examine the other points submitted to them.

*On this charge the jury brought in a verdict for [*5] a total loss, voluntarily assigning the following reasons for their thus finding:

(a) From the next case it appears the bottomry was for 6,500 dollars

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1. That they considered the port of Cadiz as partially blockaded, and that the going into that place was therefore justifiable, especially as the blockade was well known in New York before the *Prosper* left that port.

2. That they considered the crew as competent, the vessel having arrived in safety; but they did not say, nor did the judge understand them to mean, that they founded their verdict on this point upon that reason alone.

3. That the cargo was damaged, exceeding a moiety of its value, at the time of its abandonment.

4. That the seizure of the vessel having taken place subsequent to the abandonment, they did not consider it as affecting the plaintiff's right.

To the case of the defendant, containing the antecedent circumstances, were subjoined by the plaintiff the following amendments:

1. That the jury, in assigning the reason for their verdict, expressed themselves on the question, whether the port of Cadiz was blockaded or not, at the time the *Prosper* entered; for they found the fact that it was not blockaded so as to affect the insurance.

2. That they further declared their finding to be, that it was, after the resolution to put into port to repair, as advisable to make for Cadiz as for any other port.

Bogert, for the defendant. The verdict is against law and evidence. Entering a blockaded port after due notice, is a violation of neutrality, and discharges the insurer. The plaintiff, in the present case, insists, first, that there was not any existing blockade at the time when the *Prosper* entered Cadiz, and that if there was, still she was compelled to do it from necessity. The probability is, the English fleet was before the port, as the plaintiff himself declared he was warned by the British fleet not to enter. Besides this, there is strong ground for presuming the blockading squadron was at Gibraltar; and that, from its contiguity, must be considered as before Cadiz. But, the evidence is direct to

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show that the part of the fleet left to continue the *blockade, was sufficient to render all access dangerous to merchantmen; if so, it is enough. Marsh. 827. The case of *the Mercurius*, 1 Rob. Ad. Rep. 80, 82, 187, 188, 189. *The Flad Oyen*, Ib. 144, 146. *The Henrick & Maria*, Ib. 150. *The Vrow Judith*, Ib. The *quantum* of force is immaterial; it is not an object of neutral discussion. But the evidence does not prove it incompetent. The 20 or 30 sail of the line within the harbor, might have been in a disabled state, with masts and yards struck, and every way unfit for sea; a circumstance by no means improbable, as the case shows they had been shut up for nearly 4 years. Had even the whole fleet left its station, it would not have been, from that circumstance, lawful to enter Cadiz. An occasional departure never raises a blockade. *The Columbia*, 1 Rob. Ad. Rep. 156—159. *The Hurtige Hans*, 2 Rob. Ad. Rep. 124. *The Welvaart Van Pillaw*, Ib. 128. *The Jonge Petronella*, Ib. 181. It is clear, then, notwithstanding the finding of the jury, who could not determine, on this point, that the blockade existed; and it is equally clear there was not any necessity to break it. From the 15th of June to the 5th of July, the *Prosper* had been enabled to continue her voyage; in that interval no new accident had occurred. Allowing the head wind, which prevented keeping the course for Algiers, still St. Lucar's and St. Mary's were to leeward, and for either of those places that very wind was fair.

LIVINGSTON, J. I think those ports must, from their situation, have been blockaded, if Cadiz was.

Harrison. They not being ports of naval equipment, like Cadiz, were not included in the blockade.

LEWIS, Ch. J. Was there not a permission to touch at Cadiz?

Bogert. Yes. But as the blockade was known here

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when the policy was underwritten, the liberty to touch was given under the idea that it might, from our distance, have, in fact, been raised, though the news had not reached us. It was therefore accorded, that the assured might avail himself of this circumstance, not that he might jeopardize the property. Having, therefore, entered the port, it was a complete violation of neutrality, and though the loss happened afterwards, the underwriter was discharged, because it was impossible, during the voyage insured, ever to place the vessel out of danger; breach of blockade [*7] being an offence that is *never purged. *The Hurtig Hane*, 2 Rob. Ad. Rep. 124. Admitting, however, this to be against us, still the loss was from a peril not within the policy. It was the consequence of a delay arising from a pestilential fever; and though the instrument, after enumerating the particular risks insured against, adds, "all other perils," &c. still, according to the known rule of law, they refer to those only of the same kind. The detention and inability to reload, on account of the epidemic, is not to be likened to a quarantine, for that is an act of government, a restraint within the hazards mentioned. Even a seizure by a mob is not covered by the word "people." *Nesbitt v. Lushington*, 4 D. & E. 788. The injury arose from an event not contemplated by either party, and, therefore, though felt by one, does not furnish a claim against the other. The loss, too, is found to be 50 per cent. on the tar only; this rendered it a partial loss, for the tar constituted but a part of the cargo, and the deterioration, to warrant a demand for a total loss, must be on the whole, not on a part.

Hamilton and Riggs, contra. The finding of the jury on the point of blockade was voluntary on their part; it is not relied on by the plaintiff as settling what shall, and what shall not, be deemed a blockade. The amendment confines the verdict to what it absolutely was; finding that the port of Cadiz was not so blockaded as to affect the in-

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insurance. The meaning of these words is, that the blockade was known in New York; both parties acquainted with it, and the liberty to touch given unqualifiedly, that the party might go there if he pleased, and for this fifteen per cent. was paid. There is no adjudication in the books exactly analogous, but from a newspaper report of a case before Lord Ellenborough, the point was ruled in our favor. An insurance was made for Gibraltar, at the time the Spanish court had declared it to be in a state of blockade. Though this was by gun-boats only, still if, according to the principles of the defendant, the *quantum* of force is immaterial, it is a decision in point. The defence was, as here, violation of neutrality by breach of blockade; but, said his lordship, if you will insure for a blockaded port, and take your premium for it, you shall not set up the pursuing your own contract in order to defeat it. The court is aware that with us, till a very *late decision of Lord Ken- [*8] yon's, (*Stitt v. Wardell*, sittings at G. H. after Mich. 1797,) touching was by every man held to include a permission to trade. The continuance of the voyage till off Cadiz with a fair wind is no reason, that a disabled ship as she was, could have proceeded with one that was ahead, when some of her main shrouds on both sides were gone, and two of her crew, since the gale of the 18th of June, had become incapable of duty. Every thing said against the necessity of putting into port, is mere assertion from the inferences drawn by counsel, against the express testimony of the mate, and every other eye-witness, and that her entry into Cadiz was the effect of necessity, and *bona fide*, the entry of the cargo for exportation is a proof. The fever, abstractly considered, was not a risk within the policy, but it was the immediate consequence(a) of a peril within the instrument; for it arose from a putting into port occasioned by perils of the sea; and, generally, whenever a voyage is defeated by *vis major*, or *casus fortuitus*, it is within

(a) See the doctrine on this point in *Jones v. Schmale*, 1 D. & E. 130, n. (a)

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the policy, if there be no *mala fides*, or it be not the result of the assured's fault. The voyage was in its course, and the pestilence in this case had the same effect as if it had broken out in the ship, and rendered her incapable of proceeding. In the case of *Magrath and Higgins v. Church*, (Ante, vol. 1, p. 196,) the fever in Philadelphia was allowed as an excuse for staying at Wilmington, and if for staying, so for not sailing. The declaration from the captain of the *Kent* will not establish the blockade, when it is in evidence, that the British fleet had quitted their station before Cadiz, and relinquished their former object, in pursuit of another, the French. If the position be abandoned by stress of weather, or any such event, during which there is a continual endeavor to return and occupy the place that has been left, this *animus revertendi* will preserve in full force the effect of blockade. But in the present case, the views of the hostile and besieging armament were turned in a new and opposite direction. The adoption of a fresh, was a dereliction of the former purpose. It is, however, to be remarked, that on the subject of blockade, Sir William Scott has introduced, as the law of nations, a new system not warranted by that code. He has extended the principles of blockade, in a manner before unknown, and [*9] not consonant to more ancient doctrines. *According to them, a blockade was of no longer duration than while the obdiciary force was before the very spot. And this was so determined by the court of errors in the case of *Vos and Graves*. At all events, as the loss did not ensue from the breach, it does not avoid the policy. According to Sir William Scott, a blockade is said to exist, if the ingress be dangerous. With such a latitude, a few frigates at the mouth of the straits would blockade the Mediterranean. This would be like the proclamation blockade of the West-India Islands. The decisions of the English Admiralty under its now judge, have also gone the unwarrantable length of ruling, that a vessel sailing for a blockaded port, violated her neutrality in the very inception of her

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voyage. But the blockade in question was a mere farce; 20 or 30 sail of the line confined by four frigates! The supposition of the interior fleet being unfit for service, is not to be entertained, because it does not appear. Whether the loss was partial or total, was a matter submitted to the jury, and they have determined it was the latter. In calculating the deterioration to give a right of abandonment, the amount of expenses, outfits, charges, &c. are to be estimated; and if these make the aggregate of loss more than a full moiety, the assured may relinquish the subject of the policy to the underwriter, though one individual article alone was damnified. The voyage was absolutely broken up, for it could not be prosecuted but at an expense beyond what the whole cargo would produce, and money on bottomry could not be obtained. The freight, however, due, could not have been availed of because it was payable in New York. Under circumstances like these, every writer, French as well as English, allows of the right to abandon, which could not be affected by a subsequent seizure on the bond, by which she had been bottomed. The plaintiff ought to have brought the premium into court, if he intended to rely on the blockade.

Boget and Harison, in reply. Though by the law of nations, sailing for a blockaded port is a breach of neutrality, punishable with confiscation, yet by the decisions of Sir William Scott, that great and learned civilian so much complained of, the strict letter of the law has, in consequence of our remote situation, been relaxed. In one of his decisions (*The Betsey*, 1 Rob. Ad. Rep. 334.) he thus expresses himself, concerning the citizens of this country: "It is not unfair to say, that lying at [*10] such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a con-

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siderable time. A very great disadvantage indeed would be imposed upon them, if they were bound rigidly by the rule which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified. For if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued. That the Americans should therefore send their ships upon a fair conjecture that the blockade has, after a long continuance, determined, and for the purpose of making fair inquiry whether it had so determined or not, is, I think, not exceptionable. Though I certainly agree that this inquiry should not be made in the mouth of the river, or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without opportunities of fraud."

A knowledge of this departure from the rigor of the law, induced this policy to be underwritten for Cadiz. The underwriters knew sailing for the port, though blockaded, was not a breach of neutrality, and it was left to the captain to enter or not, according to the fact of the blockade having been raised or continued. When warned by the Kent, he knew the condition on which the liberty to touch had been granted was at an end. The entering afterwards was a discharge of the policy, for allowing the necessity, which ought, however, to be clearly made out, St. Lucar's and St. Mary's were unprohibited places, and both open to him had he stopped for a pilot. By not doing so he broke his warranty of neutrality. The reason why this, from the period of breach, destroys the policy is, because it alters the situation of the property. On the same principle rests the inhibition from transferring. In these events, however the policy is annulled only from the time of the illegal act done, and as the risk had previously attached on the whole sum insured, there can be no return of premium.

[*11] *This distinguishes the present case, and those of

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deviations, from others where the risk never was incurred. In these latter the underwritten is entitled to a return of premium, only because the hazard of the underwriter never had an inception. For when it has, a return into the track after the policy is vacated by deviation, neither gives a claim to a return, nor restores the contract. So here, if the port was blockaded, the insurer is discharged, though the detention from the fever be a loss within the policy. But if it be not, and the putting into Cadiz was the effect of necessity, we allow it was an excuse for remaining there, which might occasion an average loss. As to the decision of *Vos* and *Graves*, the court of errors founded its judgment on there having been no blockade. On the part of the plaintiff, blockades by notification are confounded with those *de facto*. The former commencing by notification are ended in the same manner, and therefore an occasional departure does not raise the blockade. The latter depending on the fact, terminate when the fact ceases. That a vessel having violated a blockade by ingress is, during the whole of that voyage, *in delicto*, is not the new law of Sir William Scott, but the old law of nations, as recognized by Bynkershoek Vattel, and all foreign jurists. See his Q. J. P. lib. 1, c. 11. accord. That the blockade was, if ever intermitted, only occasionally so, is evident from the testimony. Its existence was known in America previous to effecting the policy. The *Prosper* was, after entering Cadiz, ordered higher up the harbor for fear of an attack from the British ships. This shows a blockade at two different periods, in the interval between which the *Prosper* entered; and if a belligerent cannot, or dare not, dispute the power of blockading, a neuter can never do it. To attempt to conclude us in any respect by the finding of the jury, is making the very thing we complain of a reason for refusing us redress.

KENT, J. delivered the opinion of the court. A motion is made on the part of the defendants for a new trial:

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1. Because Cadiz was blockaded, and the ship went in without necessity.

2. Because the fever is not a peril within the policy.

3. Because, at any rate, the plaintiffs are only entitled to recover, as for a partial loss.

[*12] *1. On this first point, we are of opinion, that on the fifth of July, when the ship entered the port of Cadiz, that port was not blockaded. There was no naval investment of the port; there were no ships there, so as to render it hazardous to enter. The blockade had, in fact, been raised a few days before, in consequence of a naval expedition; and it is sufficient for a neutral, when he arrives off a port, to find it clear of any blockading force. He can only judge from what appears, and if he finds no blockade existing *de facto*, it is sufficient. He is not bound to inquire, or wait for events, and see whether the blockade, that once existed, is finally raised; or whether the blockading squadron still retains the *animus revertendi*. The neutral has no means of knowing when a blockade exists in contemplation of law, as contradistinguished from a blockade in fact; and to impose that knowledge upon him at his peril, would be most unreasonable. The only practicable rule is, that there must be an actual existing blockade, to render it unlawful for the neuter to enter.

The notice that the plaintiff received from a British frigate, or a British ship of the line at sea, several leagues from the port, and some days before the entry, amounted to nothing, if in fact there was no blockade of Cadiz when he arrived there. It is absurd to suppose that that ship or frigate, in the situation it was, constituted a blockade of Cadiz, nor is it to be understood that the commander of the ship made any such pretension. The plaintiff, therefore, committed no violation of his neutrality in entering Cadiz, and he had liberty to touch there by the terms of the policy.

On the second point, we are satisfied that the damage resulting from the pestilence at Cadiz is covered by the

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policy. It is not requisite to decide absolutely, whether a pestilence is a peril direct within the policy.

It formed, however, a sound excuse for delay at Cadiz, and if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss.

And with respect to the amount of the damage, we see no reason to complain of the finding of the jury, that it amounted to above one half, and justified the abandonment of the voyage. The weight of evidence [*13] on this point is in favor of the verdict, and there is no fault or neglect imputable to the plaintiff. There was a series of misfortunes, which the captain appears to have made constant and sincere, but unavailing efforts to surmount, and we are perfectly satisfied that the verdict is just, and, consequently that the defendants take nothing by their motion.

New trial refused

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WILLIAMS against SMITH.

THE SAME against THE SAME.

The purchaser of a vessel bottomed, not knowing her to be so, has an insurable interest in her, (a) and the policy underwritten in ignorance of such fact, is not thereby vacated. If, under such circumstances, the vessel be in the course of her voyage sold under the bottomry, after an abandonment for want of funds to carry it on, the underwriter will be liable on his policy deducting the amount for which the vessel sold, from the sum at which she was valued. When the insured is master and consignee, and joint owner of the cargo, his selling it at a port of necessity, where the voyage was broken up, will be deemed a reception of the goods there by him as owner, and a *pro rata* freight earned; the insurer on it is, therefore, liable only for the balance.

THESE were two actions on separate policies of insurance, on the body and freight of the American ship Prosper, from New-York to Algiers, with liberty to touch at Cadiz. The vessel valued at 5,000 dollars.

(a) A policy of insurance being an instrument by which the underwriter agrees to indemnify for losses by certain perils, the very *substratum* of the contract seems to require, that there should be in the assured an actual interest, either legal or equitable, which is capable of suffering a loss from the perils insured against. For, if there be not any interest, there cannot be any loss; and if there be not any loss, there cannot be, under the contract, any right to indemnity. Upon this train of reasoning, the court of errors reversed the judgment given by the supreme court on the case in the text. For, as the vessel was, by the valuation in the policy, estimated at only 5,000 dollars, when there existed a previous bottomry for 6,500 dollars, and she sold for no more than 1,925 dollars, it was held, that there was not any legal interest, that being in the bottomess; or any equitable interest, as there was not any surplus value beyond that for which she was hypothecated. *Smith v. Williams*, 2 Caines' Cas. in Error, 110.

A strict deduction from the same premises, would appear to lead to the total exclusion of wager policies, without the interference of legislative provisions. Yet, as actions on wagers themselves have been held to be maintainable, so wager policies have received the countenance of courts of law. *Clendinning & Adams v. Church*, 3 Caines' Rep. 141, and the cases cited there. In Massachusetts, however, contrary and purer doctrines seem to prevail;

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The facts were exactly the same as in the former suit, upon the policy on her cargo.

It was admitted, that the amount of the bottomry was 20,000 marks *banco*, or 6,500 dollars.

‘or wager policies appear to be considered there as absolutely void. *Amory v. Tyng*, 2 Mass. Rep. 1.

An interest, to be insurable, may be either legal or equitable, vested or contingent; but it must be a lawful interest, and there must be a subject matter *in esse*, in which it exists, or out of which it may arise.

The interest must be a lawful interest; that is, such as is within the protection, and within the policy of the law. Therefore, the interest of an enemyⁿ is not insurable; (*Brandon v. Nesbit*, 6 D. & E. 23; *Bristow v. Towers*, ib. 35,) nor of a subject trading with an enemy; (*Potts v. Bell*, 8 D. & E. 548,) nor of a neutral in goods to an enemy's port; (*Bromley v. Hesselstine*, 1 Camp. 75,) nor from it if he be there resident, and carry on trade; (*M'Connell v. Hector*, 3 Bos. & Pull. 113,) nor that of mates or seamen in their wages, or a specific article by way of *douceur* or *extra* compensation beyond wages; (*Webster v. De Tussot*, 7 D. & E. 157,) nor that of a lender of money to a captain of a vessel to be paid out of the freight. *Wilson v. Royal Ex. Ass. Co.* 2 Camp. 623. But where the interest is such as is within the protection and policy of the law, it is insurable; as that of a governor in a fort used as a trading post; (*Carter v. Boehm*, 3 Burr. 1905,) of a captain of a vessel in his wages; (*King v. Glover*, 2 N. R. 206,) or of a neutral in goods from an enemy's to a friendly port. *Bromley v. Hesselstine*, *ubi sup.* But *quære* as to a policy in such a case, “at” and “from.”

The interest must be legal or equitable. If it would not be acknowledged either at law, or in equity, it is not a subject of insurance. Therefore a person who has paid for a ship cannot, in England, insure the freight, unless his name be in the certificate of registry; (*Camden v. Anderson*, 5 D. & E. 709; *Marsh v. Robinson*, 4 Esp. Rep. 98,) because, under the British register act, even a conveyance is absolutely void, if the name of the purchaser do not appear in the certificate; *aliter* with us, both as to ship and freight, even of an English vessel, unless the British register act be proved, for which parol testimony is not sufficient. *Kenny v. Clarkson*, 1 Johns. Rep. 385.

A mere power, whether given by statute or otherwise, “to take into possession, manage, sell and dispose of,” ships and cargoes detained by the order of government, does not create an insurable interest. *Lucena v. Craufura* 2 N. R. 269, unanimously confirmed by all the judges in the house of lords on the 29th of June, 1803, and overruling, on this point, the judgment in the same case, 3 Bos. & Pull. 75, and *Craufurd v. Hunter*, 8 D. & E. 13. It is therefore doubtful how far prize agents and others *ejusdem generis*, have any insurable interest in captured vessels and cargoes sent to them, unless so far as their own commission, and liens for balances due, may extend. But

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The judge before whom the causes were tried, charged the jury, that if they believed the port of Cadiz was blockaded at the time the *Prosper* entered that harbor, this being a breach of neutrality, would vacate the policy. That the

if there be either a legal or equitable interest, though undivided, it is insurable; as where a statute enacts that property captured from the enemy shall be divided among the captors, their interests are insurable even before condemnation. *Stirling v. Vaughan*, 2 Camp. 225; *Boehm v. Bell*, 8 D. & E. 154; *Le Oras v. Hughes*, Park, 358.

Where there are a multiplicity of interests, either legal or equitable, in the same subject, each may be the basis of a separate policy, according to the right of the underwritten. Therefore, a mortgagee of goods, after the mortgage has become absolute, may insure his legal interest, and the equitable one of the mortgagor; (*Smith v. Lascelles*, 2 D. & E. 188, per Ashhurst, J.,) a third owner of a ship, his third of the freight; (*Sansom v. Ball*, 4 Dall. 459,) so, though he be entitled only in virtue of a purchase of a third of the tonnage for the voyage; (id. *ibid.* but see *Riley v. Delafield*, *infra*;) an endorser of a bill of lading, who has transferred only the net proceeds, his interest in the surplus value; (*Hibbert and others v. Carter*, 1 D. & E. 745,) a factor to whom a trader is indebted, the amount of his debt, in a policy on goods which he is advised will be shipped to him; (*Godin v. Roy. Ass. Co.* 1 Burr. 489,) for, wherever the law would give a man a lien on property, to that extent he may insure; (*Wolfe v. Horncastle*, 1 Bos. & Pull. 316,) and, from the case of *Godin v. Roy. Ass. Co.*, it seems that a *bona fide* policy on the expectation of the consignment advised, will not be defeated by the consignee's making, against good faith, a valid disposition of the promised remittance.

A surety in a vice-admiralty court, to whom a vessel and cargo are delivered over to indemnify him against loss, for becoming security on entering an appeal, has an insurable interest to the whole amount of both. *Russell v. Un. Ins. Co.*, 4 Dall. 421. So a part owner, who charters the other half of the vessel under an agreement to pay a certain sum in case of her loss, may insure her full value without disclosing the nature of his interest. *Oliver v. Green*, 3 Mass. Rep. 133. Note, however, the diversity between the British register act, and that of the United States.

If there be a legal interest, it is not necessary that it should be beneficial, in order to render it insurable; therefore, a mere trustee, owner of a vessel not entitled to the privileges of the American flag; (*Rhind v. Wilkinson*, 2 Taunt. 237,) *a fortiori*, if it be beneficial, though merely equitable, as that of a *cestui que trust* for whose use goods are sent to a third person. *Hill v. Secretan*, 1 Bos. & Pull. 315.

The interest may be contingent; as the commissions of a consignee; (*Finch v. Le Messurier*, Park, 356,) or of a captain on sales; (*King v. Glover*, 2 N.

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damages and repairs of the vessel having happened, and been made, at distant periods, (the first, between the arrival of the vessel and the 14th of October, when she was blown to sea, and the second, between that day and the 15th of November,) were to be considered separately, in determining whether the loss was total, or partial; and that to constitute a total loss, the subject must be injured, or impaired in value to the amount of one half. That the plaintiff appeared to consider the several injuries as merely partial, because he repaired the vessel both before she was forced to sea, and after her return to Cadiz, and previous to her abandonment there. That the wages and provisions during detention in Cadiz were to be deemed general averages; and, lastly, that a *pro rata* freight was earned as far as Cadiz.

The jury brought in their verdict in the following words:

"The jury find for the plaintiff an average loss on the ship Prosper and freight, allowing four-fifths of her freight, or 2,400 dollars, to have been earned on her arrival at Cadiz. The jury are of opinion, that in making up the *amount of the general average, the sea- [*14]

R. 206,) or the compensation of a supercargo out of the proceeds or goods of an adventure under his direction; (*Robinson v. N. Y. Ins. Co.* post, 357,) or the expected profits on a cargo belonging to the assured; (*Grant v. Parkinson*, Park, 354; 1 Marsh. 97; *Hodgson v. Glover*, 6 East, 316; *Tom v. Smith*, 3 Caines' Rep. 245; *Mumford v. Hallett*, 1 Johns. Rep. 433,) or those on a cargo to be purchased by investing, or exchanging another cargo. *Barclay v. Cousins*, 2 East, 544. So the interest of a creditor in the life of his debtor. *Per* Lord Kenyon, in *Anderson v. Edie*, Park, 575; *Godsall v. Boldero*, 9 East, 72. But there must be an actual existing subject capable of specific designation out of which the interest insured is to arise; therefore the expected profits or commissions on a cargo expected to be shipped, are not insurable. *Wood v. Knox*, Park, 356; 1 Camp. 543, S. C. Where the interest is of a particular kind, it must be disclosed and underwritten as such; as those of bottomry and *respondentia*; (*Black v. Glover*, 3 Burr. 1394; *Robertson & Brown v. Un. Ins. Co.*, 1 Johns. Cas. 250,) or that of freight reserved to the vendor of a vessel, for the voyage next after her sale. *Riley v. De-la-field*, 7 Johns. Rep. 522. But see *Sansom v. Ball*, 4 Dall. 459, where this point is not made.

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men's wages and provisions should be charged during the detention, on the principle that the detention was unusual, and presents an extraordinary case within the hazard insured against by the policy."

A motion was now made for a new trial, on the part of the plaintiff, by whom the following points were relied on:

1. That the captain's want of funds to repair the injuries of the ship, and get her to sea, was a just cause of abandonment.

2. That if the plaintiff's claim is to be affected at all by the bottomry bond, it only renders him liable to account to the defendant for the value of the ship at the time she was seized and sold at Cadiz, the amount of which sales shows her value.

3. That the plaintiff has a right to be reimbursed the moneys expended in repairing the ship, whatever may be his right to recover with respect to the ship herself.

4. That the freight was totally lost, by the voyage to Algiers, &c. being defeated, as no part of it became payable until the cargo was delivered there.

5. That if the ship earned a *pro rata* freight, the plaintiff has a right to apply the proceeds of the cargo which he received, or so much as will be necessary for that purpose.

On the part of the defendant, the points insisted upon, were,

1. That Cadiz was a blockaded port.

2. That the plaintiff had not an insurable interest in the ship, except for the surplus value, beyond the sum mentioned in the bottomry bond.

3. That if the vessel was insurable by the plaintiff, still, that as the defendant was deprived of the property abandoned, by the seizure under the bottomry bond, the plaintiff cannot recover.

4. That if the loss is to be ascribed to the fever, it is not a peril within the policy.

5. That one third is to be allowed in the repairs, new for old.

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Riggs, for the plaintiff. The subject of blockade has been sufficiently argued in the preceding cause. On the first point it is admitted, that if there was a want of funds to *continue the voyage, it was a legal [*15] sanction for abandoning. For allowing her repaired, if unable to fit out for sea, without selling so much as would break up the voyage, the right was still the same. *Cazelet v. St. Barbe*, 1 D. & E. 187; *Goss v. Withers*, 2 Burr. 696; *Hamilton v. Mendez*, 2 Burr. 1209, the third resolution. The second question is in fact this, whether a *bona fide* owner of a vessel, who does not appear to have given the bottomry bond, has not as extensive an insurable interest as if the bond did not exist. This will depend on, whether the bottomry was then a subsisting lien on the property? A bottomry given abroad is a charge on the ship only to the next, or, at the utmost, her home port, on her arrival at which it ought to be put in force. If it be not, and the vessel be permitted to sail on another voyage, the lien is gone against a third person, who comes in as a purchaser, without notice, for a full consideration. In this situation the plaintiff stands. Though it must be confessed, the Court in Spain has acted on a different principle, it ought not, however, to control our own law. But it is evident, however this may be, the bottomree is not the legal owner; the bottomer cannot at law commit barratry. *Lewin v. Suasso*, 2 Marsh. 452, 453. So little is the person holding a bottomry bond the legal owner of the ship, that he cannot, by insurance, under that word, cover his interest. *Abbott*, 117, s. 20; *Robertsons v. —*, in this court. Here, then, as we paid, with the money laid out, the full value insured upon the ship, and as she was discharged from the bottomry, by the laches of not putting the bond in force, we were entitled to a verdict for a total loss. But allowing the policy affected by the bottomry, we are to account for no more than the sum produced by her sale, and the balance is what we have a right to claim; as, however, her price was increased by the value of the repairs we gave

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her, to that extent also we ought to recover. Every reason which will operate in our favor, on the vessel, can, with equal efficacy, be applied to the freight; for this is to be supported only on the principle of ownership. If we have a just demand for any freight, it must be for the whole, the contract being in a gross sum, and not so much per barrel, or cask. In these cases, therefore, as there is no apportionment, the whole being due on arrival at the port of [*16] delivery alone, *every loss must be total. *Paul v. Birch*, 2 Atk. 621; *Abbott*, 244. That the contract for freight was by bill of lading, and not by way of charter party under seal, is immaterial, as would seem from the reasoning in *Cooke v. Jennings*, 7 D. & E. 381. *Bright v. Couper*, 1 Brownl. 21. The only exceptions to this rule are, first, where the ship being incapacitated from pursuing her voyage, and the master being willing to procure another to transport her cargo, the merchant will not agree; secondly, where the shipper consents to receive his property at an intermediate port. In the first of these cases the whole, in the latter a *pro rata*, freight is earned. But the acts of the plaintiff in this respect were all done in the character of master. The bill of lading was to deliver to another, his joint interest therefore immaterial.

Harrison and Bogert, contra. The bottomry is in itself an insurance *pro tanto*, and therefore the surplus only can be insured, according to the words of our policies. Was it otherwise, a man might hypothecate three or four times over, insure the full amount, and recover from the underwriter also. It must be supposed that the purchaser took the *Prosper* with her encumbrance, like mortgaged lands. The maxim of *caveat emptor* shows this, and at all events, as the plaintiff was on the spot when she was sold, and authorized to work, labor, &c. for the underwriter, it was incumbent on Captain Williams to have interposed a claim for the defendant. This is such a species of default as must make him liable to us, and therefore ought to prevent his

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recovery. It has taken from us the subject matter of insurance, which, after abandonment, he ought to have protected; for if the bottomry was not a lien subsisting, the ship might have been reclaimed. It would seem, however, to be otherwise; for if not, a ship might be fraudulently sent, instantly after her arrival, on a new voyage, and the bottomry thus defeated. The interests of commerce require a different rule. It is to be supposed the purchaser knew of the encumbrance; if so, it ought to have been communicated, and this would also vitiate the policy. For this purpose, everything that has been said, as to blockade, is equally fatal. But there was not any insurable interest, for the amount of the bottomry exceeded the cost of the vessel. Allowing, however, a surplus from the sale even from that *as the jury have found only an [*17] average loss, there must be a deduction of one-third, new for old. A total loss on the ship, it cannot be. Her first repairs made her fit for sea, and though, after the storm, her cargo might be more than half deteriorated, that would not justify abandoning the ship, though her decay might authorize an abandonment of the cargo, as it would be a breaking up of the voyage. This shows on her it can be only a partial loss. There is no evidence that she was deteriorated a moiety of her value. The cases cited to show no freight was earned, prove the reverse; for they were on charter parties under seal, and expressly show the distinction denied. Wherever the master is not requested to take on the goods, he is entitled to *pro rata* freight. *Luke v. Lyde*, Burr. 889. And here, as the plaintiff was owner of the ship, and consignee, he cannot, in that double capacity be considered as acting wholly for his own benefit, and to charge the underwriter. As shipper, he was bound to pay; as owner, to receive freight; his actions cannot be construed to be totally as agent for the insurer, to enable him to receive everything and pay nothing. The jury find a *pro rata* freight earned; this could have been only on the supposition that the goods were received by the plaintiff.

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Hamilton, in reply. If the interest of the plaintiff be merely that of an equity of redemption, it is insurable. Allowing, therefore, that the interest was only a surplus, the policy is void, and we must recover for that. But not knowing the previous encumbrance, the assurance was made for the whole, and the premium paid for that. Both parties were in the dark; and in cases of mutual error, he who receives a consideration ought to be bound. The Roman code acts on this rule. So Millar, 40, 41, 97. If so, a secret encumbrance is at the hazard of the underwriter. If the vessel had been bottomed at a port of necessity, and on arrival at that of destination, though not that to which she belonged, the bottomry had been put in force, the insurer would have been liable for the whole, though the subject matter was lost to him, and that by the act of the insured himself; *a fortiori* here, where it was by a [*18] *third person.(a) The policy being valued is an argument for this; because in these the worth of the article insured is agreed on, and if a *bona fide* interest is shown, it is sufficient. The case of *The Astræa*, (1 Lex. Mer. Amer. 295,) said to be in point to show the deterioration of the cargo, will not warrant abandoning the ship; but we were on the trial prevented from showing the ship was half deteriorated; the judge charging the injuries to be distinct, and not to be considered together. This, we contend, was wrong, as the accumulated amount of repairs necessary, carried them beyond the half, though the money was not actually expended, but only seem to be necessary, and the impracticability of procuring it, obvious. If it appear that the whole cargo will not suffice to fit out, and money cannot be obtained on bottomry, it can never be necessary to sacrifice the cargo and expend it before you can abandon; yet this is the result of the defendant's doctrine as to the want of proof of a deficiency of funds. If a

(a) In the case put, the bottoming would be to protect the property assured, in which the underwriter had an interest. The bottomry in the principal case prevented his interest from arising.

man act in two capacities, one as agent for himself and another, and also representative for a third person, and his conduct will apply to the *totus homo*, it is a rule so to consider it. The cargo, then, was delivered to him as agent for the underwriters alone, and this is corroborated by the entry in the consular books, which evinces on whose account the reception and sale were made.

THOMPSON, J., delivered the opinion of the court. Several of the questions raised in this cause have already been disposed of in the preceding case, against the same defendant, upon the cargo of the same vessel. The circumstances relative to the blockade of Cadiz, and the detention in consequence of the fever that broke out at Cadiz, shortly after the arrival of the vessel there, are necessarily the same. It having been decided that Cadiz could not be considered a blockaded port, there could be no objection against this vessel's putting in there, pursuant to the permission given in the policy. It is manifest, from the whole current of the testimony, that there existed a pretty strong necessity to put into Cadiz for the purpose of repairs, and that this was the sole object, and not for the purpose of trade. The captain appears to have acted with as much despatch in procuring the repairs *to be made, as the [*19] state of things at Cadiz would warrant, to have been anxious to pursue the voyage to Algiers, and did everything in his power to accomplish it, until misfortune after misfortune had so increased his expenses that he found it impossible, from the want of funds, to proceed. Thus far the facts in these cases are the same as in the case on the cargo.

But in the case on the ship it appears that, before and after the time the plaintiff purchased her, she was under a bottomry bond for upwards of 6,000 dollars, given by Casimir Delavigne, the former owner, of which the plaintiff was wholly ignorant. That while she lay at Cadiz, after all her repairs were made, though not until the plaintiff

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found that it was no longer in his power to proceed on the voyage to Algiers for want of funds, and had determined to abandon it, proceedings were instituted against the vessel under this bond, in consequence of which she was seized and sold by order of the Royal Consulado at public auction for 38,500 reals vellon, (about 1,925 dollars,) which sum, after deducting the charges, was paid to the holder of the bottomry. A question then arises here, whether the plaintiff had an insurable interest in this vessel, she being under a bottomry bond to more than the amount of her value in the policy. The assured had, we think, an insurable interest in the subject. He, having possession and the right of redemption, must be considered the owner for the purpose of insurance.

The hypothecation does not transfer the property of the ship, but only gives the creditor a privilege or claim upon it to be carried into effect by legal process. Abbott, 117.(a) The owner of a ship who has mortgaged her, and who is also master of her, cannot, while he is possessed of the equity of redemption, commit barratry; because he is still considered as the owner, notwithstanding the mortgage, and so cannot commit a fraud against himself. *Lewin v. Suasso*, in chancery, Marsh. 452. The doctrine, that the person having the possession and holding the equity of redemption, has an insurable interest, is strengthened by the decision of this court in January term, 1801, in the case of

Robertson, that the person holding the bottomry
 [*20] *bond has not an insurable interest, without there is a special clause inserted in the policy, designating the particular interest insured. There is nothing, we think, in the conduct of the plaintiff, showing want of good faith;

(a) *Quære*, whether some distinction is not to be taken between cases on bottomry bonds and those on bottomry bills? In the first, the vessel is mortgaged and assigned to the lender; in the latter, she is bound to the payment. And here again a difference may arise between cases in England and cases here, on account of the wordings of the register acts of the two countries.

all the witnesses concur in representing that he was extremely solicitous to pursue the voyage to Algiers, but that he was obliged to abandon it for want of funds. This was on the argument admitted by the defendants counsel to be, as a general principle, sufficient cause for abandonment, and breaking up the voyage. We see nothing in this case to take it out of the general rule. The difficulty and embarrassment which the plaintiff met with in raising funds, were not occasioned by the bottomry bond. No claim was made on this vessel by virtue of that bond, until after the captain had determined to abandon the voyage. The next question, then, will be as to the amount of the loss of the ship. The underwriter, we think, clearly ought not to suffer in consequence of the encumbrance on the ship by the bottomry bond; this is a loss that must be sustained by the plaintiff; or, for which he must look to the person from whom he purchased the vessel.

In ordinary cases, immediately on the abandonment, the subject insured would become the property of the underwriter, and he would be entitled to receive its full value. If, then, the underwriter has been deprived of this property in consequence of a lien or encumbrance for which he is not answerable, the assured must put him in the same situation he would have been in, had no such lien existed; that is, in the present case, by deducting the value of the vessel at the time of abandonment, from the amount of the insurance. And we know of no better rule by which to ascertain that value, than by the sale, provided there was no fraud or collusion. Had not the ship been seized under this bottomry bond, the captain would have been obliged to sell her, as the voyage must have been broken up; the sale would have been at the same place, and under equally unfavorable circumstances. We can discover no fraud or unfair conduct in the transaction. She was sold at public auction under the direction of a public officer, and we think the price for which she was sold, must, *prima facie*, be considered her true value, and *this being less [*21]

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than one half her true value, there was, of course, a total loss. We are therefore of opinion the verdict was against the evidence, and that a new trial be granted on payment of costs. With respect to the case on the freight, we are satisfied with the verdict of the jury, that there was a *pro rata* freight earned, to wit, four fifths of the whole, amounting to 2,400 dollars. The owner of the vessel was also master, and part owner of the goods. We take it to be a rule well settled, that where a ship by reason of any disaster, goes into a port shore of the place of destination, and is unable to prosecute and complete the voyage, and the goods are there received by the owner, freight must be paid according to the proportion of the voyage performed. This rule is certainly founded in justice and equity, and ought to receive a liberal application. The master here, acting in the double capacity of captain of the vessel and owner of the cargo, interfered, and disposed of the goods, and although, perhaps, it may be difficult to say whether in such a disposition he acted in his capacity of owner or master, yet, we think, *prima facie*, he ought to be considered as acting in that capacity which leads to the most equitable result, and best answers the end of justice.

The circumstances under which the cargo was received and disposed of by the plaintiff, were submitted to the jury, who, by their decision, must have considered him in that transaction, as acting in his capacity of owner; and in doubtful cases where the justice of the case is with the verdict, we think the court ought not to interfere and set it aside. The opinion of the court, therefore, is, that the plaintiff take nothing by his motion.

LIVINGSTON, J. Judgment was given in favor of the plaintiff on two other policies on this voyage; the one on ship, and the other on cargo. I concur in all the points determined, except as to the effect of the bottomry on the insurance, and in conclusion that the voyage was finally defeated from a want of funds. Here, also, I agree in the

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opinion just delivered, that a *pro rata* freight was earned as far as Cadiz, and that if the plaintiff be entitled to recover at all, the verdict is right; but I cannot think the defendants are liable for any thing on this policy.

*It is essential to the validity of every contract [*22] of this kind, that an account be given to the underwriters of every material fact, which enhances the risk. This account, in other words, should be exact and complete, because the insurer computes his risk by it. If, therefore, any circumstance be suppressed or concealed, which the insured knows to exist; and which, if disclosed, would entitle the other party to demand a higher premium, the contract is void; for every *intentional* concealment of circumstances which vary the risk, is regarded as a fraud. But it is not only a fraudulent concealment or misrepresentation that will vacate a policy. If a representation be made from oversight, or with the utmost good faith, and without any design to impose, still, if it be of a material fact, and not true, there is an end to the policy. There is no reason why the same rule should not apply to an unintentional concealment; nor ought it to form any excuse that the assured knew nothing of the fact concealed. He is supposed and ought to know every thing material that relates to the subject of insurance, and is presumed to be in a situation to lay before the underwriters every matter necessary to form a just estimate of the risk he is about to assume. The property is his, and by a moderate degree of attention he might obtain every necessary information respecting it. If he does not, he must be deemed guilty of negligence, for which he alone ought to suffer. If neither of the parties know of a circumstance which subsequent events have discovered to be important, the contract is founded in *mutual error*, in which case the parties cannot be said to have assented to it. If the assured had known the circumstances, he would not have effected an insurance at all; or would have disclosed it to the underwriters, who would have declined the risk altogether, or

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have asked an increase of premium. These principles accord with those which are laid down and illustrated by Mr. Millar, in his *Law of insurance*, "Every instance of misrepresentation and concealment," says this learned author, "*however unintentional, if it varies the risk undertaken, in the minutes particular, from that understood, destroys the consent of parties, and annuls the contract.*" [*28] "It implies not only mistake, *but mistake founded in fault." "*Culpa lata,*" say "*equibartur dolo.*" Page 49.

It remains to show the application of these principles to the present case I am now considering. Whether, in virtue of the abandonment at Cadiz, the plaintiffs be entitled to call on the defendants for payment of their subscription to the policy, inasmuch as she was, within ten days thereafter, and before the defendant could by any possibility have heard of the abandonment, seized to satisfy a bottomry bill of which they knew nothing?

The insured, before an indemnity can be demanded of an underwriter for a technical total loss, must abandon or cede to him all the property that may be recovered from shipwreck, or any other peril enumerated in the policy. In virtue of this abandonment, the underwriter is entitled to the property saved, and to dispose of it as he may think proper. But if the property thus ceded be withheld from any other cause than from one of the perils insured against; or if he cannot obtain possession for any other reason than on account of such peril, he ought not to be held to pay for the loss. It is certainly part of the contract, that in case of abandonment, the assurer shall have the property saved so far as his insurance extends; and if this right be defeated by any act of the assured, or by any circumstance not within the perils insured against, and not known to the underwriter, he cannot, without manifest injustice, be chargeable. In this case the property was kept from the defendants, and the object of the abandonment thus defeated, not by any accident within the policy,

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but by enforcing a mortgage which existed long before the insurance was effected. It cannot be pretended that the defendants assumed this risk, nor that they would, but for a very large premium, have exposed themselves to it. It is not enough that the plaintiff is willing to credit them with the proceeds of the sale under the sentence of the Spanish tribunal, which were applied to extinguish the bond. It is the *sale itself* of which they complain. No one can say that a compulsory disposition, in a foreign port, of any American vessel, and that for cash, will furnish a fair criterion of her real value; nor is it probable that the defendants, is left at liberty, as they ought to have been, would have sold her *in a way*, [*24] which could not but be attended with great sacrifice.

They would probably have ordered her to this country, or pursued other measures to make the most of the property. This reasoning may at first appear more applicable to an insurance on the vessel, but I have not thought it necessary to make any distinction; for, on the principles on which I proceed, if the voyage were impeded, or finally defeated, by occasion of the bottomry; the underwriters on freight ought to be more liable than those on the ship. But it is alleged, that it being determined to abandon the voyage previous to any proceeding on the bottomry, and the underwriters being fixed by such abandonment, it is of no importance what became of the property afterwards. Without examining the effect of an abandonment of a voyage, thus declared abroad before a consul, and without any communication of it until long after to the underwriters, I think it has been already shown that even if the abandonment were good, yet if its object, as it regarded the defendants, were defeated by judicial process not grounded on any marine peril, there ought to be no recovery. The want of funds, I am satisfied, was a mere pretence to break up the voyage, before a seizure took place under the bottomry. It is incredible that in such a city as Cadiz, between which and New York there is a

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constant commercial intercourse, it should not be practicable to raise funds necessary to repair the Prosper; but if such difficulty existed, it may fairly be imputed to the owner's inability to give an adequate security on the vessel in consequence of the antecedent hypothecation, and this furnishes another reason for not rendering the underwriters liable. But for this obstacle, no doubt, money would have been raised. My own belief is, and it is warranted by the whole course of the transaction, that no idea was entertained of abandoning the voyage to Algiers until after Williams discovered that the bottomry bill was in Cadiz; and that to avoid an arrest on that account, he contrived to put a period to the voyage, pretending that no funds were to be had to pay for or finish the repairs. How could this be possible? Mr. Terry, the American Consul, had already paid for all the repairs which had been put on previously to her being blown to sea; and it is very evident that when she was thus forced out of [*25] the bay of Cadiz, she was preparing to go to Algiers. The injury she sustained at this time was too trifling to cause any delay, and the repairs of the former injuries being paid, I regard as wholly fictitious the difficulty about funds. I neither believe it real, nor that it had any influence in terminating the voyage. My opinion therefore is, that a new trial be granted, not, however, because the damages are too small, but because the plaintiff is not entitled to recover any thing.

In the action on the ship new trial granted.

In that on the freight refused.

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HENDRICKS *against* JUDAH.

If a house be taken for a year before an act of bankruptcy, and the bankrupt continue in possession afterwards, he is not discharged from the subsequent rent by his certificate.(a)

ACTION on the case, for the use and occupation of a house. One count was on a parol agreement by the defendant with the plaintiff, to take a house of him, which the defendant afterwards refused to occupy, or pay the rent for. The other, money paid, laid out, and expended, to the use of the defendant. A verdict having been rendered for the plaintiff, the question of his right to recover was reserved

(a) Where the cause of action entirely arises after an act of bankruptcy, a certificate is not a bar. Therefore, the certificate of a bankrupt endorser on a bill or note is not a bar to an action by his endorsee who has taken up the security subsequently to the act on which the commission issued. See *Bamford v. Burrell*, 2 Bos. & Pull. 1. So the discharge of an insolvent does not exonerate from the demand of his bail, who were fixed previously to its being obtained, and pay the money afterward. *Buel v. Gordon*, 6 Johns. Rep. 126. On the same principles demands by obligees, on bonds conditioned to save harmless, if damnified, may be enforced notwithstanding a certificate posterior to their date, if the contingency of injury do not arise till after the act of bankruptcy; *aliter*, when the bond is to pay absolutely on a certain day, or is previously forfeited. *Toussaint v. Martinant*, 2 D. & E. 100; *Martin v. Court*, ib. 640; *Hodgson v. Bell*, 7 D. & E. 97. So under our insolvent law, though the forfeiture be merely that of not procuring a conveyance of a certain specific number of acres of land, for which the obligor had received payment. *Clinton & Norton v. Hart*, 1 Johns. Rep. 375. It has by a late decision been ruled, that a certificate of a bankrupt does not discharge from a judgment subsequently entered on a *cognovit* given before the certificate, the *cognovit* being, as it is said, a mere acknowledgment of damages. *Wyborne v. Ross*, 2 Taun. 68. *Aliter*, where the judgment is before the discharge, though the costs be taxed afterwards, and arise on a judgment of *non proce*. *Hurst v. Mead*, 5 D. & E. 365. The principle of the last decision governs in cases under our insolvent law, a discharge according to which will exonerate from costs subsequently ascertained, on a judgment previously rendered; (*Warne v. Constant*, 5 Johns. Rep. 135,) though it be only on a *non proce*. *Thomas v. Striker*, ib. 136 n.(a); but see the next note and cases there.

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for the opinion of the court, on a case which was shortly this:

The defendant applied to a Mrs. Bowne to rent him a house from the first of May, 1800, to the first of May, 1801. This she refused to do, but said that she would let it to the plaintiff, who might underlet it to the defendant. This was accordingly done. In September, 1800, the defendant became a bankrupt, and duly obtained his certificate, but the plaintiff never took the house off his hands, though it was for the most part unoccupied, and had, by the courtesy of the defendant, been in some degree occupied by the plaintiff, who paid to Mrs. Bowne the rent for the three quarters due after the bankruptcy. To recover this the present suit was instituted, and the sole question was, whether the bankruptcy in September, and certificate thereon, was a discharge from the subsequent rent?

Riggs, for the plaintiff. Under the circumstances of this case, the plaintiff may perhaps be considered as a surety for the defendant, paying the debt after the bankruptcy of the principal. In this point of view, the very cause of action would be subsequent. But taking it simply as a matter between landlord and tenant, it is a general proposition, that the latter does not become a debtor [*26] to the former, in a sense *that would make bankruptcy a discharge, until after the rent falls due. If it be quarterly, then at the expiration of each quarter; if annually, then at the end of the year. This principle will be found in Cullen's Bankrupt Law, 126, in *Mills v. Auriol*, 1 H. Black. 433, and *Naish v. Tatlock*, 2 H. Black. 819. The tendency of the cases is to settle this point, as between landlord and tenant, because a demand for rent, which was not payable antecedent to a bankruptcy, cannot be proved under the commission. If, therefore, it cannot be proved, it cannot be barred,^(a) and the bankrupt con-

(a) This position, though generally laid down, is not strictly correct. It seems that there are circumstances under which a demand will be barred by

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tinues liable notwithstanding his certificate, which has only a retrospective and not a prospective view. But there is a special count on a parol agreement to use, occupy, and pay, alleging damages by a breach in refusing; surely, a previous bankruptcy is not a bar to a recovery in an action sounding in damages to be subsequently assessed.

Troup, contra. As the defendant rented from the plaintiff, it is a question merely between landlord and tenant. An underletting can never change the mesne tenant into a surety. It is settled, that to an action of debt on a lease, brought after a bankruptcy, for rent subsequently accrued, the certificate is a bar, nay, even if it be on the implied covenant in the *reddendum*.^(a) A distinction, however, has in the English books been taken, where the suit is on an express covenant to pay, in which case it is said the bankruptcy is not a discharge. 1 Saund. 241; 4 D. & E. 94; 1 H. Black. 433. The reasoning, however, on which the rule is established in the first cases, would equally apply to the last, for the bankrupt is as much divested of the possession in this as in the others. The effect of the statute is compulsory upon him, and he is disabled by the act of the law: his immediate inability, therefore, ought alone to be looked at, and not the remote consequence of an agreement, made concerning land, of which he is divested.

a certificate, though the amount cannot be proved. Thus, if there be a mere cause of action antecedent to the act of bankruptcy, for which a suit is previously instituted, the verdict subsequently obtained, with the costs, will be barred, but the costs themselves cannot be proved. *Ex parte Hill*, 11 Ves. jun. 646. Whether in such a case the verdict which was prior to the bankruptcy be, by a judgment posteriorly entered up, rendered a provable debt, is, perhaps, rather doubtful. See *Ex parte Charles*, 14 East, 197, and *Willst v. Pringle*, 2 N. R. 130, where, as well as in *Ex parte Hill*, the old cases on this point are examined.

(a) That is, because it is payable out of the land, and not on account of it. The action is founded not merely on the terms of the demise, but on the enjoyment of the tenant. Co. Litt. 142, a. and Lord Mansfield in *Wadhams v. Marlowe*.

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"It were infinite," says the quaint language of Lord Bacon, (Bac. Law Tracts, 35,) "for the law to judge the causes of causes, and their impulses one of another, therefore it contenteth itself with the immediate causes, and judgeth of acts by that, without looking to any farther degree. If any annuity be granted, *pro concilio impendendo*, and the grantee commit treason, whereby he is imprisoned, [*27] so that the grantor *cannot have access to him for his counsel, nevertheless the annuity is not determined by this nonfeasance, yet it was the grantee's own default to omit the treason, whereby the imprisonment grew; but the law looketh not so far; but excuseth him, because the not giving counsel was compulsory, and not voluntary, in regard to the imprisonment." So here, the law has, against the consent and will of the defendant, deprived him of the means of performing his promise; and shall he be held to it, when the very consideration is taken out of his hands? In *Mayor v. Stewart*, Yates, J., says, "As the act devests him of his whole estate, and renders him absolutely incapable of performing his covenant, it would be a hardship upon him, if he should remain still liable to it, when he is disabled by the act of parliament from performance." By act of law, the very consideration is taken away, and, therefore, for want of one, the action is not maintainable. As to its sounding in damages, so does a suit on a promissory note, and yet it is discharged by a certificate: for the debt upon it might be proved, and why not this; as it was a demand growing before the commission, *a plain debitum in presenti solvendum in futuro*.

Riggs, in reply. The continued use and occupation, after the bankruptcy, creates the consideration for the rent demanded. The cases cited proceed on this ground; if the assignees take possession under a lease, the bankrupt is exonerated, because they are liable; but if they do not, then he continues responsible; and even if they do, he is not discharged from an express covenant, because bankruptcy

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does not dissolve the contract.(a) But here the contract exists,(b) and the defendant has had a full consideration by enjoying under it.

LIVINGSTON, J. delivered the opinion of the court. The only ground on which a certificated bankrupt can expect to be exonerated from a demand of this kind, is the hardship of continuing liable after a surrender of all his estate, and among the rest, this very property, to assignees for the benefit of all his creditors; but is this the fact? It does not appear by the case. We well know that a house of this kind, on so short a lease, is not worth more than the rent reserved, and (notwithstanding the generality of the assignment) is not taken possession of by the assignees.(c) It continues in the bankrupt's occupation, and if so, as we must presume was the case here, such being the usual course of things, and the contrary not being found, upon what pretence can he ask an exemption from this suit? He, and not his creditors, have derived a benefit from this property since his bankruptcy. Therefore he, and not the estate assigned, should be bur-

(a) Therefore if an annuity be granted by deed in which there is a covenant to pay as it becomes due, and the annuity be also secured by a bond, an action may be maintained on the covenant, for arrears accrued subsequent to the bankruptcy, though the bond was forfeited before. *Cotterell v. Hook*, Doug. 97. For a statute which vests the estates of debtors in assignees, does not discharge the debtor from an express covenant, which is collateral to the land. *Hornby v. Houlditch*, And. 40; *Lansing v. Pendergrast*, 9 Johns. Rep. 127.

(b) Therefore *assumpsit* will lie against a bankrupt lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding the occupation by his assignees for part of the time during which the rent accrued. *Boot v. Wilson*, 8 East, 311. But debt will not lie on the *reddendum* of a lease for rent accruing after the commissioners' assignment, the consent of the lessor to it being virtually included in the act of parliament. *Wadhams v. Marlowe*, 8 East, 314, n.

(c) In which case they are not liable for the rent accruing subsequently to the bankruptcy. *Bourdillon v. Dalton and others*, 1 Esp. Rep. 233.

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dened with the rent. *Qui sentit commodum, sentire debet et onus.*

It may be subjoined that the debt being contingent, for a case of eviction nothing would have been due, proof of it would not have been admitted under the commission, and, therefore, unless there remain a liability in the defendant, the plaintiff will be without remedy. Cullen's Bank. Law, 84—126, 3 D. & E. 544.[1] We mean, however, to be understood as determining this cause more particularly on the ground of the defendant's occupying the premises after his discharge, than on any other, and of the total want of proof that the assignees ever took possession of them. Judgment must be entered on the verdict, as found by the jury. See *Van Raugh v. Van Arsdahn*, 3 Caines' Rep. 154, n.(a)

Postea to the plaintiff.

[1] A discharge under the insolvent act is no bar to an action on an express covenant to pay rent, brought to recover rent accruing subsequent to the insolvent's discharge. 9 J. R. 127. And, generally, if the creditor, at the time of the assignment by the insolvent debtor, has not a certain debt due or owing, (although it may not be then payable,) so as to entitle him to a dividend of the insolvent's effects, he will not be barred by the discharge. *Mechanics' and Farmers' Bank v. Capron*, 15 J. R. 467; *Frost v. Carter*, 1 Johns. Cas. 73; *Duel v. Gordon*, 6 J. R. 126; *Andrews v. Waring*, 20 id. 153. But now the discharge exonerates from liability incurred by making or endorsing any promissory note or bill of exchange, or in consequence of the payment, by any party thereto, of the money secured thereby. See 3 Rev. Stat. p. 22, § 31.

Livingston v. The Columbian Ins. Co.—Strong v. Smith.

LIVINGSTON *against* THE COLUMBIAN INSURANCE COMPANY.

A struck jury will not be granted without affidavit, though the opposite side make no objection, and acknowledge service of notice of the motion.

BOGERT, in behalf of the defendants, moved for a struck jury in this cause, on an acknowledgment from the attorney of the plaintiff of service of notice of the motion, but this was not accompanied with any affidavit of the importance or intricacy of the cause.

Per Curiam. The court ought to be satisfied that the cause is either intricate or important, (*vide ante*, vol. 1, p. 498; *Spencer v. Sampson*, *Foot v. Croswell*.) and that by affidavit.

N. B. The court seemed inclined against the granting of struck juries, as a matter of course, on a mere formal affidavit.

STRONG AND OTHERS *against* SMITH.

If a defendant, before a justice, rely, in an action of trespass, on his title, he confesses the trespass, and cannot, on moving the cause into this court, plead the general issue.

THIS was an action of trespass commenced before a justice of the peace in the county of Suffolk, under the "Act for the more speedy recovery of debts to the value of twenty-five dollars." 1 Rev. Laws, 491. The defendant justified under a plea of title. Upon this, proceedings were stayed before the justice pursuant to the tenth section of the act, (*Ibid.* 494;) and *the action prosecuted [*29]

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before the court of common pleas; from thence the defendant removed it by *habeas corpus* into this court, where he pleaded, 1st. The general issue; 2d. That the closes mentioned in the declaration, were the freehold of the trustees of the freeholders and commonalty of the town of Huntington, and that by their command and direction, he entered; 3d. That the trustees of the freeholders of the town of Huntington were seised of the premises, and granted him a lease for a year, by virtue of which he entered and was possessed until the plaintiffs, by color of title, turned him out, on whom he again entered, and committed the trespasses complained of.

A suggestion of these circumstances, according to an intimation on a former day given by the court, having been entered on the record, an application was now made to compel the defendant to strike out his plea of the general issue, and rely on his title only.

Riggs, for the plaintiff. The justification by way of title is an admission of the trespass. It is only on the strength of this admission that the defendant has been able to take the cause from the jurisdiction before which it was originally brought. He can never, therefore be now permitted to contradict what he has thus conceded.

Sanford, contra. The tenth section confines the reliance on title alone to the common pleas. There is not a word of this court; when, therefore, the suit is removed here, it is to be prosecuted according to the rules and practice of the tribunal before which it is brought, in the same manner as any other action originating here.

Riggs, in reply. The intent of the statute was to confine actions for trifling damages to the inferior court; in the common pleas, the production of the defendant's plea countersigned by the justice, would have been conclusive against the general issue. The same reason applies now. Under

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the statute the defendant has a right to elect, either to rest on his innocence, or insist on his title. Having made his election, he cannot vary the right given by this election to the plaintiff of considering the trespass admitted. The delay alone is against it. A witness may die. But we ground ourselves on the spirit and object of the act.

Per Curiam. The construction of the act no doubt is, that when a defendant, sued for a trespass before a justice, relies *on his title, he admits the trespass. [*80] But lest the title should be in a third person, the act gives him a right to show that also. Either one or the other acknowledges the trespass. To this, as the whole matter appears on the record, it would not be permitted the defendant on the trial at *nisi prius* to say the contrary, nor would the plaintiff be called on to prove the trespass done. The general issue, then, is perfectly nugatory, and must be struck out, but not with costs.[1]

SPENCER, J. dissentient.

Motion granted without costs.

ROOSEVELT against KEMPER.

Affidavit of merits sufficient to set aside an inquest taken at the circuit, and with costs.

The plaintiff had in this cause taken an inquest at the last circuit, the judge laying it down as a general rule, that any party might take an inquest, but at his peril.

1] See to the same effect, *Brotherton v. Wright*, 15 Wend. 237; *Marah v. Berry*, 7 Cow. 344. But now, by section 55 of the Code of P., the defendant, in a justice's court may, either with or without other matter of defence, set forth in his answer any matter showing that such title will come in question.

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Harrison moved to set aside the inquest on a simple affidavit of merits.

Per Curiam. Whenever an inquest is taken, it is at the risk of the plaintiff; and on such an affidavit as the present must be set aside with costs.[1]

N. B. The court seemed to intimate that counter depositions of a want of merits could not be received, as it would be trying a cause on affidavits.

GRACIE *against* BOWNE.

In a policy effected in New York upon goods at twelve cents per pound, the weight will be determined by the English standard, though the invoice specify the weight to be French.

THIS was an action on a policy of insurance on coffee, part of the cargo of the ship *Arethusa*, from *Jeremie*, in the West Indies, to Baltimore, or New York, valued at 20 cents per pound.

By the bill of lading the coffee was to be delivered at Baltimore, paying two cents per pound freight, a note in the margin, declaring "that the freight was to be calculated, and paid on the "weight of the custom-house, at Baltimore."

The only matter in contest at the trial was, whether the coffee being estimated at twenty-five cents per pound, in the policy, the loss should be calculated on the English or French weight.

It appeared in evidence, that the standard difference between English and French weight is eight per cent., 108 pounds English making 100 pounds French.

[1] But for the present practice, see 12th General Rule of S. Court.

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That in Baltimore, it is the established custom, in cases *of valued policies on goods by weight, to [*31] bring the foreign into English, by adding or subtracting from it, according to the standard; it being always understood, unless the contrary is expressed, that the English weight is the quantity actually insured; to bring French into which, eight per cent. is there added to the French. That in the city of New York there is no such usage. That in paying the freight, where the contract is for so much per cent. the New York merchants are governed by the actual weight there, without regard to the foreign weight, expressed either in the bill of lading or invoice. That in truth, the difference between French and English weight, varies from one to eight per cent. according as the shipment is from different houses, but that the medium is five per cent.

On these facts a verdict for the plaintiff was taken by consent for 1,187 dollars and fifty cents, to stand, if the opinion of the court should be, that the standard difference between French and English weight was to be the rule of calculation: to be reduced, however, to 589 dollars and 80 cents, if the medium difference was to govern; and, should they determine that the French weight ought to prevail, then to be entered for 259 dollars and 8 cents.

Hamilton and Hoffman, for the plaintiff. All contracts are to be expounded according to the interpretation the words will bear in the country where entered into. This is a valued insurance, and the valuation for no other reason than to prevent all reference to the invoice, which an open policy might induce. In contracts for freight, the American acceptance of pound is resorted to. So it must be here, and the standard difference ought to govern, because it is the more certain and uniform. Otherwise there will be one rule for estimating against underwriters a claim for a loss, and another against the underwritten for a demand due on the freight. In Baltimore, our principle is allowed,

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and, to exclude it, the insurer ought to show a contrary usage.

Harrison and Pendleton, contra. A contract is not always to be interpreted according to the language of the *lex loci*. It may, as here, refer to other countries. The policy attached in a foreign port, and supposing a total loss the invoice must have been referred to. It is only in case of arrival, that the weight can be ascertained here without [*32] *such a resort, and the very nature of insurance is against the contemplation of safety. The bill of lading is a strong argument for rejecting the standard difference. When that is to govern, it is expressed; *ergo*, when not so specified, the French is to regulate; more particularly so, as the bill of lading is framed with a view to safe arrival, contrary to the motives of insurance. If, however, any reference is to be made to the English weight, the medium difference ought certainly to prevail, as being more consonant to equitable justice, and equally certain, for the jury have settled it at five per cent.

Hamilton, in reply. When a contract made in one country is to be executed abroad, then the foreign parts are adverted to; but though the subject be abroad, if it be to be carried into effect where made, the *lex loci contractus*, the law of the place, is to govern. The word *cents* is used in the policy: this proves it was to be confined to this spot, and the pounds like the money, referable to the United States. The policy, too, was underwritten without information of the invoice; it must, therefore, be thrown out of the question, as the insurance can be interpreted only according to the knowledge of the parties, which never extended to the wording a paper made in *Jeremie*.

SPENCER, J. delivered the opinion of the court. The only question arising in this cause is, whether the weight of the articles insured is to be considered French or American?

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The difference between them as stated, and admitted by the case, is agreeable to the standard, eight per cent. that is to say, eight per cent. is added to the American, on the French weight, to ascertain the weight according to our standard.

In the construction of policies of insurance, the intention of the parties is to be sought from the circumstances attending the transaction, and the usage of the trade.

This policy was subscribed in New York, and it appears to us that the parties could have had reference to no other weight than that of the country where the insurance was effected. If other circumstances were wanted to manifest such intention, they might be found in the use of the currency of this country in making the valuation. In contracts here, referring to weight or currency generally, it appears *to us, that to intend any other [*88] than those in use here would be doing violence to the intention of parties.

It is stated in the case, that in paying freight, where the contract is to pay so much per lb., it is the usage in the city of New York to be governed by the actual weight, without regard to the foreign weight expressed in the bill of lading, but in cases like the present, there is no usage in New York.

We think the usage, and the reason of it, as respects freight, applicable to the present case.

In Baltimore it is stated that there is a usage in cases like the present, and that there the weight is ascertained by adding eight per cent. to the French.

On the argument it was contended, for the defendants, that in consequence of prior insurances, the plaintiff was not entitled to recover beyond the premium; it was answered that the object of the plaintiff was to cover the profits on the cargo.

The agreement of the parties to the case before the court, supercedes the necessity of any examination of this point.

It is expressly agreed, that if the court should be of opin-

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ion that the difference between French and English weight, as established by the legal standard, shall be the rule or guide, then the verdict to stand.

We are therefore of opinion, that in judgment of law, the parties intended the American weight; and, that in ascertaining that, the standard difference eight per cent. ought to be added to the weight in the bill of lading, and that the plaintiff is entitled to his judgment accordingly.

Judgment for the plaintiff according to the standard difference.

BROWN, assignee of **DAWSON**, a bankrupt, *against* **CUMING**.

In an action by assignees of a bankrupt for money due their bankrupt as supercargo of a ship, the defendant cannot set off a claim against the bankrupt for not keeping his vessel fully insured, the same being then unliquidated.

ASSUMPSIT by the assignees of a bankrupt for work and labor, care and diligence, about the defendant's business, with a count for money had and received.

The circumstances of the case were simply these: The bankrupt had been supercargo of a vessel belonging to the defendant, on a voyage from St. Croix to Philadelphia, and from thence to Amsterdam, with orders to keep the ship fully insured. He, in the course of her voyage, advanced money for repairs, and also for prosecuting a claim for her recovery, which he interposed on her being captured and carried into a British port. The vessel, however, though insured for 10,000 dollars, was not covered for the [*34] amount of the *repairs, and the sum which she thus stood short insured, the defendant claimed a right to set off.(a) Whether he was entitled to this or not, was the only question.

(a) By the common law, claims arising out of, or connected with, the plaintiff's demand, are the only object of set-off. These it seems incumbent

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Hamilton, for the defendant. Wherever there is a particular individual agency, all omissions, relating to the subject matter, which induce loss, are objects of set-off. Where a party omits to insure, he becomes an insurer. This right

on the defendant to urge, if not by plea, at least by way of evidence in mitigation of damages. Therefore, where an action was brought for the recovery of commissions due to the plaintiff on shipping a cargo of wheat for the defendant, who had in an anterior action against the plaintiff recovered for a breach of the contract to ship, Lord Ellenborough ruled, that the action for the commissions could not be maintained, as the amount due for them might have been given in evidence on the trial for the breach of contract, by way of reducing the damages, and that the verdict in that case had closed the account between the parties. *Kist and others v. Atkinson*, 2 Camp. 63. The reason of this decision may perhaps be, that the law abhors a multiplicity of actions. It is singular that in a jurisprudence adopting such a maxim, the right of set-off should have been so confined. By the Roman code it was thought indispensable to the ends of justice. *Compensatio*, say the Digests, (lib. 16, tit. 2, *de Compensationibus*), *necessaria est, quia interest nostris potius non solvere, quam solutum repetere*. This necessity is acknowledged in our statute law, by which the right of set-off is extended to unconnected demands; (*Dale v. Sollet*, 4 Burr. 2133; *Green v. Farmer*, *ibid.* 2221,) for wherever there are mutual "debts," in consequence of mutual "dealings," the right of set-off exists. 1 Rev. Laws, 347. The rule under these words is, that not only the object of set-off, but that of the action in which it is offered, must be a *debt* certain and liquidated; (*Nedriffe v. Hogan*, 2 Burr. 1024; *Howlett v. Strickland*, Cowp. 56; *Gordon v. Bowne*, 2 Johns. Rep. 150,) for a set-off cannot be made against a demand which cannot itself be set off; therefore in an action for not paying over money according to agreement there cannot be a set-off. *Colson v. Welch*, 1 Esp. Rep. 379. It follows, from the first part of the antecedent rule, that a set-off cannot be made in an action on an open policy of insurance, (*Gordon v. Bowne*, *ubi sup.*) nor of the unascertained losses on such a policy, even in an action for recovery of the commission agreed to be paid for guaranteeing the amount covered by the policy; (*Carruthers v. Graham*, 14 East, 578,) nor of the penalty of a bond; nor of unliquidated damages on a covenant; (*Howlett v. Strickland*, *ubi sup.*) or from any other cause; (*Freeman v. Hyett*, 1 Bl. 394,) nor where there is not a debt; as in actions for torts, of detinue, trover, or replevin; (*Abraham v. Knight*, Barnes, 450; *Sapford v. Fletcher*, 4 D. & E. 511,) and that such a debt as will maintain a suit; therefore a *nudum pactum* cannot be set off; (*Taylor v. Morey*, 9 Johns. Rep. 358,) nor a debt barred by the statute of limitations; (*Cranch v. Kirkman*, Peake, 121,) nor a debt for which a prisoner was in execution, and has been discharged on a compromise,

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we contend for, is in a more emphatical degree to be insisted on in this case, which arises under the bankrupt laws, because they admit of a more liberal set-off than any

though the security taken for the amount prove afterwards to be void, *Jaques v. Withy*, 1 D. & E. 557.

But where there have been mutual debts, and the plaintiff has kept alive those of the defendant to him, by suing out and continuing process, counter notes given by him to the defendant, though due for more than six years, will, by the equity of the statute, be revived, and become objects of set-off; (*Ord v. Ruspini*, 2 Esp. Rep. 569,) so where there are mutual accounts, an item of the plaintiff's demand, which is within the period of limitation, will revive the antecedent charges of the defendant, which are without it; (*Cranch v. Kirkman*, *ubi sup.*) and, as imprisonment is not payment a debt for which a defendant has a plaintiff in execution, may be set off in an action by such plaintiff, against the defendant at whose suit the plaintiff is imprisoned; (*Peacock v. Jeffery*, 1 Taun. 425,) and a defendant, who is in execution, may, on motion, set off against the sum for which he is in prison, the amount he has recovered in a cross action against the plaintiff at whose suit he is in custody. *Vaughan v. Davis*, 2 H. Black. 440.

It is not necessary, however, that the debt should be a strictly legal right; an equitable interest may be set off; as that of an assignee of a bond or chose in action, against a legal claim; (*Tuttle v. Bebez*, 8 Johns. Rep. 53, and the cases cited there;) or a legal claim against an equitable interest. *Ruggles v. Keeler*, 3 Johns. Rep. 264.

When a debt is certain, whether on the face of an instrument in writing, or by jury intervention, a set-off is allowable, either against a sum due to an obligee on the breach of a condition, though the bond be not for the payment of money only; (*Burgess v. Tucker*, 5 Johns. Rep. 105,) or of the sum due on such a bond. *Fletcher v. Dytche*, 2 D. & E. 32. So an average loss, the amount of which the underwriter has acknowledged, may be set off by a broker with a *del credere*, in an action against him for the amount of premiums. *Weinholt v. Roberts*, 2 Camp. 586.

Another rule as to set-off is, that the debt must be due from the plaintiff in the same right or capacity as that in which he sues. Therefore, a debt due to an executrix in right of her testator, cannot be set off against a demand made on her in her own right; (*Bishop v. Church*, 3 Atk. 691,) nor a debt due from a testator, in an action by his executor for a cause of action arising after the testator's decease; (*Shipman v. Thompson*, Willes, 26, n. (e); nor in an action by an officer on a bail bond, a debt due from him in his individual capacity. *Hutchinson v. Sturges*, Willes, 261.

For the same reason, in a suit by a solvent partner and the assignees of his two co-partners who had become bankrupt, a set-off cannot be made of a debt due from the old firm, though completely represented by the plaintiffs in the action; (*Thomason and others v. Freere and others*, 10 East, 418,)

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other, by extending it to all cases of mutual credit. 1 Cooke's B. L. 569; *Ex parte Deeze*, 1 Atk. 228. So in the case of *Smith v. De Sylva*, Cowp. 469.(a)

because a joint debt cannot be set off against a separate demand, nor a separate demand against a joint debt. *Ex parte Edward*, 1 Atk. 100; *Glaister v. Heuer and others*, 8 D. & E. 69.

But where the whole interest in a debt which might be demanded of several, or which was originally due to several, becomes payable from one, or vested in one person, a set-off may be made of a debt due by or to him; therefore a debt due on a joint and several bond, may be set off against a demand of one obligor only; (*Fletcher v. Dytche*, 2 D. & E. 32,) so a debt from a plaintiff as surviving partner, may be set off against a demand by him, in his own right; (*French v. Andrade*, 6 D. & E. 582,) and *vice versa* a debt due to a defendant as surviving partner, against a demand on him in his individual capacity. *Slipper v. Stinstone*, 5 D. & E. 493. Upon the principle last above stated it has been ruled by the supreme court of the United States, that where the debts due to a firm are assigned to one of the house who is thereout to pay the demands against the concern, and subsequently carries on the same business, a joint debt of the old partnership may, under the bankrupt law of the general government, be set off against a separate demand of the assignee. *Tucker v. Oxley*, 5 Cranch, 34. And where a joint concern is carried on in the name of one person only, who appears to be a sole trader, a separate debt may be set off against a joint demand of himself and a dormant partner. *Stacey v. Decy*, 2 Esp. Rep. 469; 7 D. & E. 359, S. O.

Debts actually joint, and known to be so, may, by agreement, be made objects of set-off against separate demands. *Kinnerly and others v. Hosack*, 2 Taun. 170.

The right of set-off may be insisted on, though an express promise has been made to relinquish it; for though the debt from the defendant arises on a loan by the plaintiff, on making of which the defendant promised not to set off his demand against the plaintiff, it may be availed of; (*Lechmere v. Hawkins*, 2 Esp. Rep. 626; *Taylor v. Okey*, 13 Ves. jun. 180,) nor can it be destroyed by a transfer to one of many joint creditors; therefore where a promissory note is given to a house consisting of several members, who endorse it over to another house constituted of a portion of the same members, a set-off can be made of a debt due from the whole firm, in an action by that which consists of only a part; (*Puller v. Roe and others*, Peake, 197,) nor by taking a guaranty from a third person for goods sold and delivered; the value of which may notwithstanding be set off by the vendor, in an action by the vendee. *Dunmore v. Taylor*, Peake, 41.

Against a demand, by an assignee of stock in a company, for a transfer, a

(a) That was not a case of set-off.

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Riggs, contra. Two points may be made; 1st. Whether the demand of the defendant can be set off under the general statute? 1 Rev. Laws of N. Y. 347. If not, 2d. Whether under the bankrupt law of the United States? As to the first point, there must be mutual debts; debts mutually due at the commencement of the action. *Montagu on Set-off*. 17.(a) The demand of the defendant must be a debt, certain and liquidated; for uncertain, or unliquidated damages cannot be set off. It must be such a claim, that for it *indebitatus assumpsit* will lie. *Freeman v.*

debt due from the assignor to the company on a loan to him, cannot be set off, (*Mellionchi v. Roy. Ex. Ass. Co.*, 1 Eq. Cas. Abr. 8.) unless there be a by-law subjecting each member's stock to his debts to the company. *Gibson v. Hudson's Bay Co.*, 1 Stra. 645.

In an action by a factor against a vendee of goods, the latter may set off a debt due from the principal, where the factor has no lien. *Drinkwater v. Goodwin*, Cowp. 251. Where the factor conceals the name of his principal, and deals as owner of the goods he sells and delivers, a vendee may in an action by the principal set off a debt due from the factor. *George v. Claggett*, 7 D. & E. 359. But a right of set-off cannot subsist between a buyer and his own broker, to the prejudice of the seller; (*Waring v. Flavenck*, 1 Camp. 85,) nor between him and the broker of the seller, after information of the seller's name; (*Moore v. Clementson*, 2 Camp. 22,) though a broker with a *del credere* commission, can set off losses paid by him, in an action by the assignees of a bankrupt underwriter, for premiums received. *Grove v. Dubois*, 1 D. & E. 112, and see *Biss v. Dickason*, *ibid.* 285.

The right of set-off continues to the time of action brought; (*Evans v. Prosser*, 3 D. & E. 186,) but by a late decision it seems, that a secret assignment of a debt by a creditor, *without notice to his debtor*, will destroy his right to make a set-off of any thing arising from subsequent dealings. *Brisban & Brannan v. Caines*, 10 Johns. Rep. 45. This case, however, seems very questionable; it takes away, by an act valid only on equitable principles, a legal right, and that against the rules of equity; (*Ryall v. Rowles*, 1 Vez. 348, 375; *Curzon v. African Comp.* 1 Vern. 122; *Peters v. Soame*, 2 Vern. 428; *Dounman v. Mathews*, Prec. in Ch. 580, and a host of other cases,) and places, contrary to the rule of law, an assignee in a better situation than his assignor. A writ of error is, however, depending, in which the decision of the supreme court of New York will be reviewed. For set-off of judgments see *Schemerhorn v. Schemerhorn*, 3 Caines' Rep. 190.

(a) Therefore a plea of set-off that the plaintiff was indebted to the defendant at the time of plea pleaded, is bad. *Evans v. Prosser*, 3 D. & E. 186.

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Hyett, 1 Black. Rep. 394 ;(a) *Howlett v. Strickland*, Cowp. 56. Therefore, uncertain damages, requiring the intervention of a jury, do not admit of set-off. *Weigall v. Waters*, 6 D. & E. 488. Here, had the defendant sued, it could not have been by *indebitatus assumpsit*, but by a special action on the case, sounding in tort, and bottomed on negligence, in which the plea would have been not guilty. *Hancock v. Entwistle*, 3 D. & E. 434. Suppose the case of a claim for demurrage, and the sum not fixed in the charter party, could it be set off before the amount had been ascertained by a verdict? Clearly not. Then how can the sum not covered be settled, but by a jury, before whom the value of the vessel, and the amount insured could be made to appear? Besides, the bankrupt was vested with a discretionary power as to the *quantum* to be insured; it is only on a gross neglect, or wilful abuse of such power,(b) that the agent becomes liable to his principal, and stands in the place of insurer. Where there has been a tort in law, the equity of courts has allowed a set-off in cases where the *damages were reducable to arithmetical cer- [*35] tainty, without the aid of a jury; or, rather, where the jury must have been governed by such a calculation. In trover against a carrier for delivering goods to a wrong person, the sum due for carriage becomes, on this principle, a matter of set-off. But that reasoning cannot apply in this case. As to whether it could be set off under the bankrupt law, the only difference between that and our state act is, that in the former the words mutual credit are used. They mean either where a credit is given; as for goods sold, and payment to be at a future day, *debitum in presenti, solvendum in futuro*; or, where a person is intrusted with the property of another, and it turns out in the event that he is a debtor upon the sale of that property. Russell,

(a) Damages not yet recovered cannot be set off.

(b) *Moore v. Morgan*, Cowp. 479. The agent insured with an office which did not guaranty against one particular risk. His conduct being *bona fide*, it was held he should not be charged.

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arguendo, in *Smith v. Hodson*, 4 D. & E. 211; *Prescott's case*, 1 Atk. 230; *Ex parte De Seze*, *ibid.* 222; *French v. Fenn*, Montagu on Set-Off, Append. 19. In these the credit is given in the very transaction; the sums certain, or reducible to certainty, by calculation. Here it can be done only by jury intervention. Lord Kenyon, in *Hancock v. Entwistle*, 3 D. & E. 435, says it is a principle that no debts can be set off under a commission but such as are provable; for they are controvertible expressions. Cullen's B. L. 110. If provable, it must have been such a one as could be found by the commissioners, on striking a balance. *Ibid.* 192, 197. The defendant's demand could not have been a debt due before bankruptcy, and ascertainable afterwards; for, till his negligence or misconduct be found, he cannot be a debtor; because, till the contrary appear, every man is believed to have acted right, and if Dawson acted *bona fide*, then there is nothing due from him.

Hamilton. In cases where a *quantum valebat* or a *quantum meruit* will lie, there may be a set-off, and the principle of those will equally apply.^(a) How much were the goods worth, or how much did he deserve, would be the inquiries there; and in this it is how much was insured, and how much not. This is as plainly matter of arithmetic as any other. If not, the plaintiff may recover the whole amount of the contract; and yet the subject matter of the contract have been totally lost and destroyed by the ill conduct of the supercargo. This would be to make us pay wages for injury instead of service. There is no [*36] decision against the right we claim; it is *not inequitable; in all cases of equitable interposition, the courts have gone step by step from the strict law, to favor and extend justice. The rule adopted in *trover* is one instance; this will, it is hoped, be another, especially as it is confined to cases in which the set-off claimed relates to the

(a) In those cases the debt exists; in those like the present, the very existence is contingent.

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matter on which the plaintiff's action is grounded. It would be hard when we have lost our ship, to make us pay the full amount of a demand about that very ship, and then turn us in under a commission which pays only sixpence in the pound.

Riggs. We say you cannot come under the commission, but have your remedy against the person.

LIVINGSTON, J. delivered the opinion of the court. We have considered this case with great inclination in favor of the proposed set-off, and with some solicitude to discover adjudged cases which would justify our going this length. It does not seem right that a supercargo who has violated his employer's instructions, and thereby subjected him to a heavy loss, should recover any moneys expended during such agency, without permitting the latter to deduct or set off the sum which has been lost by his neglect and breach of orders; and when it is recollected that the plaintiff is a bankrupt, the defendant's case, if the set-off be refused, is still harder, as he will still have to pay the whole of the present recovery, and come in only for a dividend on his demand against Dawson's estate, provided it were capable of being liquidated at the time of his bankruptcy. But strong as our leaning is, we cannot find that courts have as yet gone thus far. Where transactions constitute an account between parties, composed of mutual receipts and payments, it is contrary to reason as well as the understanding of the parties themselves, to consider any thing but the balance to be the real debt betwixt them. Yet the forms of law render it necessary for each party to sue the other in separate actions. This inconvenience, says a writer on this branch of law, for a long time remained a reproach to English jurisprudence; several statutes were at length passed to remedy this mischief, the first of which applied to cases of bankruptcy. In this state also we have an act on the same subject: and the legislature of the United

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States in like manner have provided for cases of this kind.

[*37] *Our state law declares, (vol. 1, p. 437,) that, "where there has been mutual credit, or where mutual debts subsisted between the insolvent and any other person, the assignee shall state an account between them, and one *debt* may be set against the other; and what shall be due on the balance of such *account*, and on setting such *debts* against one another, and no more, shall be claimed or paid on either side respectively." The bankrupt act of the United States provides for cases of mutual credit, and mutual debts, and declares, in like manner, that after stating an account between the bankrupt and the other person, one debt may be set against the other.

Mutual credit, in common acceptation, is certainly confined to pecuniary demands; and as both acts speak of setting off one *debt* against the other, it can hardly be doubted that the legislature intended to embrace no other kind of demand. How can an account be stated between these parties? or how can a claim, made for breach of orders in technical or other language, be turned into a debt? The case in *Ex parte Deeze*, 1 Atk. 228, cited by the defendant, was in chancery, and Lord *Hardwicke* determined nothing more than that a packer of goods should not be compelled to deliver them to the assignees of the owner who had become a bankrupt, without paying both the cost of packing and pressing, and also a debt due on another account: but even in this case, the chancellor considered the goods in the hands of *Deeze*, (as Lord *Couper* had done on a former occasion,) and the note given, as forming an account current between the parties. He took notice also of *Deeze* being indebted to *Nichols*, the bankrupt, for wine about the same sum which the packing of the goods cost, and that those items also constituted an account between them. But here there is nothing which can form an account between the parties; on one side there is a demand for moneys laid out in repairs and supplies for the defendant's

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hip; but on the other, no moneys which he has received, or with which he has been intrusted, or property which has been committed to his care, for which he has to account.

The demand is also of a nature too uncertain and contingent to be set off.

In *Freeman v. Hyett*, 1 Black. 304, in an action for *money due for a parcel of cloths, the court [*38] would not permit the defendant to show by way of set off, that a former parcel of cloths bought of the same plaintiff were burnt in pressing, which had greatly lowered their value; but put the party to his special action on the case. In *Howlett v. Strickland*, Cowp. 56. Lord Mansfield and the other judges would not permit unliquidated damages, occasioned by the breach of other covenants to be performed by the plaintiff, to be pleaded by way of set-off. "These damages," says his lordship, "are no debts;" and Mr. Justice Aston was clear that "an unliquidated demand, or uncertain damages, could not be set off." So in *Weigall v. Waters*, 6 D. & E. 488, to an action of covenant for rent, the defendant was not permitted to set off damages which he had sustained by reason of breaches of certain covenants on the part of the landlord. "The sum to be recovered," says Lord Kenyon, "is uncertain; it must be assessed by a jury, and there is no pretence to say that those uncertain damages may be set off in the present action." (a)

In the present case the damages are still more uncertain, and the trial must be complicated to a great degree. Why the defendant did not insure? or whether he could have insured fully? and what damages have been sustained? would be questions which ought not to be tried in this collateral way. The two cases last cited furnish also an answer to one argument of the defendant's counsel, which is not without force, that as the set-off related to the same

(a) Therefore where an agreement is entered into for performance of covenants with a penalty, and the covenants are broken, the penalty cannot be set off. *Nedriffe v. Hogan*, 2 Burr. 1024.

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agency on which the plaintiff's claim is founded, it ought to be admitted; and yet in the cases just referred to, we find the claim of the defendants arose out of the same instruments on which the actions were brought, but was rejected. The judge, therefore, who tried the cause, was right in overruling the testimony, and the plaintiff must have judgment.[1]

Postea to the plaintiff.

HUNN and others *against* BOWNE.

If goods sold for a promissory note at sixty days, be left in the possession of the vendor, and he show them as the goods of the vendee, a sale by the vendee will be good, against one by the vendor, notwithstanding the bankruptcy of the vendee, it appearing such sale by the vendor was after the knowledge of his vendee's bankruptcy.

THIS was an action of trover to recover the value of twenty bales of cotton. The property in question had, on the 29th of December, 1801, been sold by one Rodman to a Mr. John Foley, at a credit of 60 days, and for the [*39] *amount of the purchase Foley gave his note, payable at that period. The goods, however, were not delivered, but continued in the possession of Rodman.

A few days afterwards Foley informed Hutchison, a broker that he had some cotton for sale, which lay in Rodman's store; in consequence of which, the broker called on Rodman, and without giving any intimation of his motives, desired to see Mr. Foley's cotton. On this, Rodman directed one of his clerks to show Hutchison the cotton, which then lay in a fire proof store, and had a mark upon it. Hutchison, after an examination of the quality of the article, on account of the plaintiffs, made a purchase of it from Foley,

[1] The present doctrine of recoupment appears to be applicable to this case.

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who, on then receiving the plaintiffs' notes for the full value which have since been duly paid, gave an order on Rodman for the delivery of the commodity. This order, however, was not immediately presented, nor was the transaction communicated to Rodman, in whose possession the cotton was suffered to remain. While so continuing, Foley became a bankrupt, and the day before the falling due of his note, which Rodman had placed, together with the cotton, in the hands of the defendant, as a security for money borrowed, Hutchison, called on Rodman and producing Foley's order for delivery, which bore a date long antecedent, demanded the goods. These Rodman refused to deliver, alleging as reasons, the bankruptcy of Foley, and non-payment of his note, after the protesting of which the cotton was bought by the defendant.

Rodman himself had since become a bankrupt, obtained his certificate, and testified that he did not consider the goods as left with him for storage.

The jury having found a verdict for the plaintiffs to the full amount of the value of the cotton, the defendant now moved for a new trial, on the ground of the plaintiffs not being entitled to recover.

Boyd, for the defendant. If Rodman has not by any act divested himself of the right to retain the goods against any purchaser from Foley, the innocent vendee of Rodman, will have the right he enjoyed. The property remained in Rodman's hands, and as it was a chattel interest, possession was evidence of property. Besides, the second sale was two months after that attempted to be set up. It is settled that, wherever there is any *fraud, insolvency [*40] of the vendee, or failure of the consideration on the part of the purchaser, and the vendor can get the goods into his possession, he may retain against the buyer, and thus indemnify himself for the price. *Owenson v. Monse*, 7 D. & E. 66; *Goodall v. Skelton*, 2 H. Black, 316. There is no case which contradicts this, unless it be one in 7 D. &

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E.(a) which was an exception. In *Feize v. Wray*, 3 East, 93, it was held that accepting bills did not hurt the right.

This, then, establishes the right of Rodman, and overrules the principle in 7 D. & E. as to a bill being payment. There was *laches* in the plaintiffs' remaining with their order in their pockets for two months without presenting it, and when the cotton was looked at, it was without explaining it to be the result of an offer to sell. The antecedent debt to Bowne was good payment, nor does its being an existing debt invalidate the consideration; for the discharge of a previous demand is, both in law and equity, a valid consideration. To decide against the defendant will be to destroy commercial security.

Hoffman, contra. The plaintiffs are equally *bona fide* purchasers with the defendants; and if the defendant has not a better claim than Rodman, the verdict must stand. The order was a constructive delivery(b) by Rodman; this was a voucher of property given by him to prove Foley's interest. The rule, then, is, when a man is enabled by the act or confidence of another, to commit a fraud on a third person, the person by whom he is thus enabled shall bear the loss. In the case from East, and the others cited, this principle was not involved. This constructive delivery was so connected with circumstances, as to make the general rule still stronger against the defendant. The cotton was asked for, and shown as Foley's. This was a plain act, confirming a construction of law; therefore, had the order been then presented, Rodman would, and must have delivered. The property passed by his conduct. It was an assent to the order, which, as the cotton was asked for in Foley's name, Rodman must have known had been re-

(a) I do not know what case the learned counsel alludes to, as I cannot find any contrary to his position.

(b) It might, perhaps, be more correctly termed an actual delivery in law. See *Hollingsworth v. Napier*, 3 Caines' Rep. 183 n. (a); the different kinds of delivery, what shall amount to them, what not, and their effects.

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presented by Foley as his. Possession, therefore, in contemplation of law, was in the plaintiffs, for Rodman's possession was the possession of Hunn and his partners; as, wherever *there is a mixed possession of a personal chattel, it is considered as that of him who has right. *Smith v. Smith*, 2 Stra. 955. But on the defendant's own showing he had only an equitable lien, this shall never overreach the title of a *bona fide* purchaser. *Lempriere v. Pesley*, 2 D. & E. 490. The payment from the defendant, such as it is, was on the eve of bankruptcy. The cotton when put into the hands of Bowne, was on an executory contract. That with the plaintiff was executed; and no sale without payment, unless the contract expressly give time, is executed: the right therefore not complete when it is executory.

Benson, in reply. The silence of Hutchison, as to the object of his inquiry, exculpates Rodman from all blame. Suppose Foley had come and asked to see his cotton, and after his insolvency without bankruptcy, had demanded the cotton; or his assigns, under a commission, had done so, could not Rodman have retained? If he could against Foley's assignees, then he could against the plaintiffs, and as he could do it, so can his vendee.

THOMPSON, J. I think a new trial ought not to be granted. The circumstances stated in the case, fairly warranted the jury in drawing the conclusion that the defendant ought to be considered as a purchaser, with full knowledge of all the circumstances, relative to the situation of this cotton. No time is stated when he made the purchase, although Mr. Rodman himself, from whom he purchased it, was examined as a witness. It does, however, appear, that it must have been after Foley's note to Rodman fell due, and had been protested for non-payment, which must have been some time after the 1st of March, 1802.

The defendant acknowledged that the cotton was first

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put into his possession, to sell for Mr. Rodman : this could not have been until after Foley's bankruptcy, because Mr. Rodman himself testified that his determination not to deliver the cotton, was made in consequence of Foley's becoming a bankrupt. The cotton remained as it was, when Foley made the purchase, until after this period. Rodman finding his note from Foley would not probably be paid, determined to retain the cotton, and, some time afterwards, must be presumed to have delivered it to the de-
 [*42] fendant, *first to sell, afterwards to remain as a pledge, but concluding, probably, that an actual sale would be better calculated to secure the cotton against the plaintiff's claim, such sale was made, so that the defendant ought not to be viewed in a more favorable point of light than Mr. Rodman himself would be were he the defendant. The plaintiffs, however, cannot be considered as standing in the same situation as Foley would, were he plaintiff; they must be viewed as innocent *bona fide* purchasers. When application was made to them to purchase this cotton, they sent to Rodman and this cotton was shown them as the property of Foley ; no pretence was made that he had any claim or lien upon it, and it is evident, at that time, he had no such pretensions, for John Rodman swears, that it was not until after Foley became bankrupt that he determined not to deliver the cotton. The plaintiffs, therefore, had every reason to believe, from the conduct of Rodman, that there would be no objections against delivering this cotton whenever called for.[1] There is no pre-

[1] Declaring a note to be good to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor. *Watson's Ex. v. M'Laren*, 19 Wend. 557. To make false statements of the payee respecting paper negotiated by him, available to the holder as an estoppel, so as to prevent such payee from setting up the defence of usury, they must have been made to induce the holder to purchase, and have been confided in, and in good faith acted upon by him; he must have been deceived by them. *Truscott v. Davis*, 4 Barb. 495. Where a party, either by his declaration or conduct, has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth

tence of any agreement that the cotton was to remain in his possession as security for Foley's note, which was payable in sixty days. The contract of sale was complete, and the note received as payment, and there can be no doubt that Foley might have legally demanded the goods immediately after the purchase. It certainly cannot be pretended, that on the sale of goods upon a credit, the vendor has a right to retain them as security for the payment of the purchase-money. But even admitting that, as against Foley, the goods might be stopped *in transitu*, it by no means follows, that, as against innocent purchasers, the same doctrine would apply. In the case of *Lickbarrow v. Mason*, 2 D. & E. 61, it was decided that a consignor may stop goods *in transitu*, before they got into the hands of the consignee, in case of his insolvency; yet if the consignee has assigned the bills of lading to a third person for a valuable consideration, the right of the consignor, as against such third person, is devested. The right of the vendor to stop goods *in transitu*, in case of the insolvency of the vendee is a kind of equitable lien adopted by the law, for the purpose of attaining substantial justice, and not on the ground of rescinding the contract. In the case of *Lempriere v. Pasley*, 7 D. & E. 445; 2 D. & E. 490, *Ashhurst, J.* in delivering the judgment of the *court, laid it [*43] down as a fundamental principle, that as between a person who has an *equitable lien*, and a third person who

of the admission, if the consequence would be to work an injury to such third person, or one claiming under him; *Denzell v. Odell*, 3 Hill, 215. But before a party is held to be thus concluded, it must appear:—1. That he has made an admission which is clearly inconsistent with the evidence which he proposes to give; 2. That the other party has acted upon the admission; and 3. That the latter will be injured by allowing the truth of the admission to be disproved. *Ib.*

See also with respect to estoppel *in pais*, *Petrie v. Foster*, 21 Wend. 172; *Foster v. Newland*, *Id.* 94; *Demyer v. Souzer*, 6 Wend. 436; *Ruggles v. Sherman*, 14 J. R. 446; *Swick v. Sears*, 1 Hill, 17; *Frost v. Strattons Mutual Ins. Co.*, 5 Denio, 154; *Welland Canal Co. v. Hathaway*, 3 Wend. 480; *Dewey v. Bordwell*, 9 Wend. 95.

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purchases the thing for valuable consideration, and without notice, the prior equitable lien shall not overreach the title of the vendee. As the plaintiffs in this case have paid a valuable consideration for the goods, and there is no color for imputing to them fraud or notice of any pretended lien by Rodman, a new trial ought not to be granted.

LIVINGSTON, J. Were this a question between Foley and the present defendant, it would not, perhaps, have occasioned much difficulty. I should be inclined to think, that in such case he could not recover, without paying his note given to Rodman, and which was endorsed to Bowne. But when the rights of a fair purchaser intervene, the doctrine of stopping goods *in transitu*, which has been carried far enough, ought not to be strained in favor of the vendor, or, as is the case here, in favor of a creditor of the vendor to whom they were first pledged, and in satisfaction of whose demand they were afterwards sold.

There certainly was a sufficient delivery here to justify a sale by Foley to the plaintiffs. The cotton was shown by Rodman as his, and although the person to whom it was shown did not declare his object, it might reasonably be supposed he wanted to buy it, and yet no caution was given, nor any claim set up to the property by Rodman. After this, it would be hard indeed on the plaintiffs to postpone their right to that of the defendant, who took the property after the sale by Foley, to secure an antecedent debt. In the case of *Owenson v. Morse*, 7 D. & E. 66, the original purchaser brought his action to recover some articles of plate against the vendor, and set up a delivery of them to an engraver, as a delivery to himself. In such cases a court will go a great way to protect the right of the seller; and Lord *Kenyon*, considering it as an unjust attempt in the plaintiff to get the goods without paying for them, determined, and so did the other judges, that as the engraver was employed by the defendant, the goods were at

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most **in transitu*, and the price not being paid, he [*44] had a right to retain them.

This case, as has been already stated, is very different. It is that of a *bona fide* purchaser, to whom, or to whose agent, the property was shown as Foley's before the bargain was concluded. After this Rodman had no right to defeat the plaintiff's claim by delivering the property to another. I am of opinion the finding of the jury was right.

KENT, J. These facts present a struggle between *bona fide* creditors, which of them shall avoid a loss; and he who has used the best diligence, or has the legal advantage, ought to be preferred.

This case turns upon the question, whether there was a *delivery* of the cotton by Rodman to Foley. Delivery in a sale, says one of the Civilians, may be either real, by putting the thing sold into the possession, (2 Ersk. 481,) or under the power of the purchaser, or it may be *symbolical*, when the thing sold does not admit of actual delivery. To illustrate this last instance, it is settled in the English law agreeably to the rule in the civil law, (Dig. 41, 1, 9, 6; 1 Ersk. 194,) that where goods are ponderous, and incapable of being handed over, there need not be an actual *delivery* but it may be made by that which is tantamount, such as the delivery of the key of a warehouse, or by delivery of other *indicia*. But there must be a delivery in the one way or the other, according to the subject matter, or the property is not absolutely divested from the vendor, although the risk may be, in many respects, with the vendee. So in a variety of cases, (1 H. Bl. 363,) delivery may be *presumed* from circumstances so as to vest the property in the vendee. If there be a destination of the goods by the vendor to the use of the vendee, by marking them, or putting them up to be delivered, or removing them for that purpose, the vendee may be entitled to act as owner. But in this case of a presumed delivery, the title of the vendor is not divested till the goods have come to the possession of

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the *vendee*: (Dig. lib, 19, tit. 1, 13; 7 D. & E. 64, 440; 1 Atk. 345; 5 D. & E. 490,) and he may, for just cause, retract the intended delivery; he may detain them against the vendee till the price be paid..

In the present case, there was no delivery, in any sense, of the twenty bales of cotton; and as no application [*45] was made to Rodman for a delivery until after the bankruptcy of Foley, he had an equitable lien on the goods for his debt, and that right being accompanied with the actual possession, it is lawful for him to exert it against the plaintiffs, notwithstanding they were third persons and purchasers from Foley. He had equal equity with them, and in addition to that, he was clothed with the lawful possession, which gave him the paramount claim. To arrest the goods from the vendor under those circumstances, would, in my opinion, be unjust: negligence in this case was imputable to Foley and the plaintiffs. The cotton was suffered to remain in possession of Rodman, without any mark or destination of the property, until the failure of the vendee; and of two innocent creditors, he who has used the most vigilance, or has the legal advantage, shall be preferred.

I place my opinion entirely upon the ground that the possession of the cotton never passed from Rodman, and that he did not assign it to the defendant, until after the bankruptcy of Foley. I think, therefore, the defendant has the better title, and that the verdict ought to be set aside, on payment of costs.

New trial refused.

Depeyster v. Warne.

DEPEYSTER *against* WARNE.

If proceedings be irregular, they will be set aside though the defendant do not swear to merits, and the plaintiff swear there are none.(a)

HARISON moved to set aside the default, interlocutory judgment, and all subsequent proceedings, on affidavits of the defendant's attorney and his clerk, stating notice of retainer served at the office of the opposite attorney, (which was acknowledged to have been received by a person then in the office of the plaintiff's attorney, and acting either as clerk, agent or partner,) and also setting forth service of notice of special bail having been filed, an entry of which, and of service of retainer, was made in the register of the deponent.

EVERTSON opposed the application on an affidavit made by himself, stating the debt to be on a promissory note, in which there was no defence, and that if the defendant could make any, he had several times offered to give up the judgment. That the person mentioned in the affidavits on behalf of the defendant as being a clerk, agent, or partner, was neither the one nor the other; that neither the deponent nor any of his clerks knew of any person being retained as an attorney for the defendant though in the register of the deponent was entered a receipt of a service of notice of bail. That the defendant was in execution, and an insolvent. From these circumstances, and because the defendant had not sworn to merits, it was contended that the default and proceedings ought to stand.

HARISON, in reply, insisted, that whether the defendant had merits or not was immaterial. The plaintiff had been

(a) *S. P. Howell v. Denniston*, 3 Caines' Rep. 97. For the effect of merits where the proceedings are regular, see *Cogswell v. Vanderburgh*, 1 Caines' Rep. 157 n. (a)

 Baker and Sloane v. Sleight.

irregular, and the practice of the court must, in all suits, however well founded, be adhered to.

Per Curiam. There is strong reason to believe that notice of retainer was duly served, and though no merits are sworn to, we cannot depart from our rules. Let the default, judgment, and all subsequent proceedings, be set aside with costs; but on condition that the defendant does not bring any action for false imprisonment.

Motion granted.

 BAKER AND SLOANE *against* SLEIGHT, SHERIFF OF THE
COUNTY OF ULSTER.

It is not necessary in an affidavit to change the *venue*, to state the cause of action. If it be not transitory it should be shown by the opposite side. The influence from the mere office of sheriff not sufficient cause to change the *venue*.

EVERTSON, on an affidavit not specifying the ground of action, moved to change the *venue* from the county of Dutchess to that of Ulster.

Hopkins opposed it on a counter affidavit, stating a belief, that in consequence of the influence the defendant possessed in Ulster from his office, a fair and impartial trial could not be had there. He insisted also on the defectiveness of the plaintiff's affidavit, in not setting forth the ground of action, and that it ought therefore to be presumed it was not a transitory suit.

Per Curiam. The court cannot intend that the action is not transitory; it ought to have been shown by the defendant, and the influence of a sheriff's office never can prevent an impartial trial.(a) Take your rule.

(a) See *Zolieskie v. Bauder*, 1 *Caines' Rep.* 488 n.(a)

Pell v. Bunker.

PELL *against* BUNKER.

Practice as to vacating commissions.

IN this cause *Hawes* moved to in part vacate a commission sued out in in November last, so as to go to trial notwithstanding, at the next circuit. See *Kirby v. Walkies*, 1 Caines' Rep. 508, n. (a)

**D. A. Ogden* opposed it, on the ground that eight [*47] months had not elapsed since it was issued, and relied on this as the established practice, in cases of commissions to Europe.

Per Curiam. Granting the motion will do no injury; the time may or may not elapse before the cause is brought on, and it does not prevent, even then, the showing of cause to further postpone the trial.

Motion granted.

COLES, TITFORD AND BROOKES, *against* THOMPSON.

Commission.

THE court had, the last term, (1 Caines' Rep. 517,) denied a motion for judgment as in case of nonsuit for not proceeding to trial, on the plaintiffs' stipulating to try at the last sittings for the city and county of New-York, nine months having elapsed since issuing the commission in the cause. The plaintiffs not having proceeded agreeably to that stipulation,

Boyd moved again for judgment as in case of nonsuit.

Munro, contra, read an affidavit stating the commission

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to have been mislaid by the defendant's commissioner, to have been found, and was shortly expected to be returned.

Per Curiam. The motion must be refused; but the plaintiff must pay costs and stipulate anew. (See vol. 1, p. 7, n. (a) and p. 503, n. (a).)

Motion denied on costs and stipulating.

CLASON against GOULD.

In an action for publishing a libel, the court will discharge a judge's order for holding to special bail, unless special cause be shown by affidavit.

THIS was a motion on the part of the defendant to be discharged from a judge's order, directing him to be held to bail in 1,500 dollars. The suit was for a libel, in styling the plaintiff "a late German convict." The plaintiff, in his affidavit, stated the charge, and declared the same to be false and malicious, without adding any thing more.

Per Curiam. The defendant must be discharged. The affidavit does not show a cause of action sufficient to hold to bail. In a suit for defamation, whether the defamation be by words or writing, the plaintiff is not entitled to hold to bail, except in slander of title, unless some special cause be shown. No special cause is disclosed in the [*48] present case. To allow *bail here, would be to allow it in every case of defamation. There is no rule or guide given for the discretion of the judge or court, and that discretion, upon such an affidavit as the present, must necessarily be arbitrary, which the law will not allow.[1]

Motion granted.

[1] For the present practice with respect to arrest, see Code of P., secn. '78 to 184.

Seixas v. Woods.

SEIXAS AND SEIXAS *against* WOODS.

In an action on the case for selling one article for another, there must be either a warranty or fraud.^(a) A sound price does not imply a warranty of soundness. The description in a bill of parcels is no warranty.

THIS was an action on the case for selling peachum wood for brazilleto. The former worth hardly anything, the latter of considerable value.

(a) The effect of a warranty on a sale of goods being to oblige the person by whom it is made to indemnify the vendee against all losses induced by a failure of the warranty, however innocent the warrantor may be, courts of law appear to have been very cautious in subjecting to such wide extended liability. It is, therefore, a general rule, that on the sale of chattels there is not any implied warranty, unless as to the title. *Hernance v. Vernoy*, 6 Johns. Rep. 5. That to constitute a warranty it must be express, and it is not raised by a sound price, or a mere affirmation of the quality or kind of the article sold; (*Defrees v. Truinger*, 1 Johns. Rep. 274; *Holden v. Dakin*, 4 Johns. Rep. 421,) nor by a mere affirmation of the value; (*Davis v. Meeker*, 5 Johns. Rep. 354,) nor, according to the case in the text, by a written description; and where the subject is of dubious quality, in which common judgments might be deceived. Lord Kenyon has ruled the same. Therefore, where an auctioneer, on a sale of pictures, set, in the printed catalogue, opposite to each, the name of a painter, his lordship determined that it did not amount to a warranty of the picture's being the work of such artist. *Jendwine v. Slade*, 2 Esp. Rep. 572. But where a substantive fact was specified in an emphatic manner, by printing in the articles of sale in italics, that an estate was "*free from encumbrances*," the court of common pleas held that it amounted to a warranty. *Quaife v. Erhart*, 1, II. Bl. 289. Where, on a sale by auction, the duty may, on the vendor's doing certain acts, be avoided, if the auctioneer say that he has taken such precautions that if the vendor's price be not bid, there will be no sale, and the duty not payable, it is a warranty against incurring the duty, though the auctioneer act in good faith, and be mistaken as to the legal effect of what he did, *Capp v. Topham*, 6 East, 392. The reason of this decision may perhaps be, that the auctioneer was acting in the line of his vocation. Where a servant is employed to sell a horse, he has an implied authority to warrant his soundness; (*Alexander v. Gibson*, 2 Camp. 555,) so a broker, authorized to advertise a general ship for any port, to warrant that she shall sail with convoy. *Ringuist v. Ditchell*, Abb. on Ship. part 2, p. 8. If it be necessary to proceed on the warranty, the action may be maintained against him who made it, though he plead partnership in abatement, provided he sold as his separate property, and gave

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The defendant had received the wood in question from a house in New Providence, to whom he was agent, and in the invoice it was mentioned as *brazilletto*. He had also advertised it as *brazilletto*, had shown the invoice to the plaintiffs, and had made out the bill of parcels for *brazilletto*. But it was not pretended that he knew that it was *peachum*, nor did the plaintiffs suspect it to be so, as it was delivered from the vessel, and picked out from other wood by a person on their behalf. In short, neither side knew it to be other than *brazilletto*, nor was any fraud imputed. On discovery, however, of the real quality of the wood, it was offered to the defendant, and the purchase-money demanded. On his refusal to accept the one, or return the other, as he had remitted the proceeds, the present action was brought, in which a verdict was taken for the plaintiffs, subject to the opinion of the court.

Hoffman, for the plaintiffs. The simple point is whether the party who is here, though an agent, be not liable. If the credit be to the agent, he will be liable; but not if it be to the principal. This is like the case of a captain of a

the warranty solely. *Clark v. Holmes*, 3 Johns. Rep. 148. But where case was brought for a deceit by means of a joint warranty, on a joint sale of joint property, proof of a separate sale and warranty of the joint property, by one of the defendants, who sold it as *his own*, will not support the action. *Wool v. King*, 12 East, 452. If the action be for deceit in the sale, or *assumpsit* for not delivering on a sale of goods those of a certain description, but others of a different quality and sort, fraud must be alleged and proved. *Snell and others v. Moses and Sons*, 1 Johns. Rep. 90. But, after verdict, if an affirmation be stated in the count, which proceeds to set forth that "the plaintiff, by reason of the said affirmation of the said defendant, was fraudulently and falsely deceived," the fraud and deceit are sufficiently alleged, as has been determined in the court of errors, in *Bayard v. Malcolm*, 2 Johns. Rep. 550, reversing a contrary decision of the supreme court in the same case, (1 Johns. Rep. 345,) which seems to be the better law, though of no authority. Where the *scienter* was expressly laid, proof of knowledge in the agent beyond sea, was held sufficient in an action against the merchant, his principal, in whom the jury found there was not any actual deceit, but that it was in the agent. *Hern v. Nichols*, 1 Salk. 289.

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ship who is known to be the agent of his owners, but still, for necessities furnished, is liable on his contract.^(a) In these cases, the party has a triple remedy, the captain, owner and ship: therefore, though we may have a remedy against the principal, it is by no means an exoneration of the agent. In *Macbeath v. Halliman*, 1 D. & E. 181, it is acknowledged an agent may make himself responsible on his contract, but government being, in that case, made the debtor by the plaintiff, it was determined no credit was given to the defendant. The knowing, therefore, that there is a principal, is not giving credit to him. The bill of parcels is complete evidence that the defendant made the sale in his own name, not on account of his principal; *he is, therefore, clearly answerable. Sup. [*49] pose a consignment sent to this country, and a purchase from the consignee, are we driven to look abroad? But it will be contended, that admitting the agent is liable, still it must be with this qualification, that he has not paid over the money. *Buller v. Harrison*, Cowp. 566, will be relied on for this. But there the money was paid by mistake, and the agent did not accelerate; here he took an active step; he sold and received profits; he was not a mere recipient of money paid to him voluntarily. But there was no remittance in this case. It is not a remittance in point of law. It was made in January, 1801, a month before the note given in part payment fell due, which was not till the next month. How, then, could this return cargo, transmitted in January, be a remittance of money not receivable till February? Suppose, when the note fell due, the fact of the wood being different from that for which it was purchased had been known, payment had been refused, and the note put in suit by the defendant; would not these circumstances have been a

(a) *Rick v. Coe*, Cowp. 636, but the doctrine is laid down rather too broad in this case. See *Farmer v. Davis*, 1 D. & E. 108. In a home port the ship is not liable.

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complete defence? The description of the wood, in a bill of parcels, is as full a warranty of its quality, as a description of a vessel's being American, in a warranty in a policy of insurance. Though the contracts are different, the rules of construction ought to be the same. If so, and a warranty was created, then, on the principles in insurance cases, parol evidence was inadmissible. To evince the first position with which we began, *Genoa v. Sladen*, Bull. N. P. 180, is fully in point; for it is there laid down, that a factor beyond sea may be sued by a vendor for goods purchased on account of his principal, "because," adds the author of the *Lex Mercatoria Americana*, (1 *Lex Merc. Amer.* 401,) from whom the case is cited, "it would otherwise be impossible to carry on trade; for who would trust a person unknown, and a thousand miles distant?" (a)

Woods and Harrison, contra. The remittance is with us considered as important. In addition to this we shall consider that in all cases like this, unless there be a warranty, *avancer*, or fraud, the defendant is not responsible. These three things are indispensable. As to a warranty, there is nothing like it, unless the mere representation ["56] "calling it *brunello* be so. The plaintiffs were as capable of judging as the defendant. If otherwise, it was the plaintiffs' duty to have asked the defendant, do you warrant? The mere saying it was *brunello* did not warrant it, for it is not every assertion that will make a warranty. To render it so, Buller, J. says, in *Parley v. Freeman*, 3 D. & E. 57, it must appear by evidence that it was so intended. If, then, it was not sworn to at the trial, it cannot now be supplied. The transaction on the part

(a) This position of the author of that book has been subsequently confirmed in *Houghton v. Mathews*, 3 Bos. & Pull. 490, by Chambre, J., who there says, "where the principal resides abroad, he is supposed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties."

of the defendant was perfectly fair; every information he himself had was given; every paper and document relating to the article shipped, were laid before the plaintiff, who was left to exercise his own judgment on the article, and the communications respecting it. In *Springwell v. Allen*, 11 Allyn, 61, "for falsely and maliciously selling a horse to the plaintiff, as the proper horse of the defendant, *ubi re vera*, it was the horse of Sir J. L. because the plaintiff could not prove that the defendant knew it not to be his own horse, for the declaration must be that he did it fraudulently, or knowing it to be not his own horse, for the defendant bought the horse in Smithfield, but not legally sold, the plaintiff was nonsuited." So in *Devothing v. Mortimer*, 2 East, 462, n. the *scienter* was held necessary to be proved. The same doctrine is to be found in 1 Sid. 248. *Leithins v. Ossel*, S. C. 1 Keb. 522. Proof of an assertion will not maintain the action; the plaintiff must establish the *scienter*. A mere insertion in a bill of parcels can never amount to warranty; for that purpose, technical words are necessary. The contents of a bill of parcels are never obligatory. 12 Vin. 6 E(x) In this respect, it is the custom of trade invariably to make out the bill in the name of the agent. But the action ought to be against the principal, unless *in cases of mala fides*, or notice. *Sadler v. Evans*, 4 Barr. 1836. The notice is not contended, and as to *mala fides*, the case expresses the very reverse. In all contracts for sale, every person is supposed acquainted with the subject matter. All purchasers, in presumption of law, are deemed competent judges of what they are about to buy; and if they will purchase without attention to circumstances, the maxim of *caveat emptor* will apply.^(b) This doctrine is fully recognized in *Parkinson v. Lee*, 2 East, 814. The seller of a

(a) Pl. 1, it is supposed is intended. *Dyobler v. Sturdy*.

(b) It has been said this maxim relates only to fraud. See 1 East 262, Amer. 272, citing a case from Dallas.

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parcel of hops, with a latent defect, which he did not know of, and without warranty,(a) or fraud, held not to be answerable though they turn out unmerchable. For the vendee is supposed to be as competent a judge of the commodity as the vendor. When he is not, and doubts his own abilities, he requires a warranty; and the reason that it is held of such force in law, is because a trust is then reposed in the seller, on the faith of which alone the buyer acts. In *Dowding v. Mortimer*, already referred to, the declaration stated "that the plaintiff bargained with the defendant, to buy of him a certain musket, as and for a sound and perfect musket, at and for a large price, to wit, 2l. 12s. 6d. and that the defendant then and there knowing the said musket to be unsound, broken and imperfect, then and there sold the said musket to the plaintiff, as and for a sound and perfect musket." Yet it was held there was no warranty, and being so, it must be proved that it was done *scienter* by the defendant, otherwise there can be no recovery. There is no analogy between the case put as to warranties in policies. There the subject matter of the contract is, that there shall be an American ship; if there is none, there is no contract. The plaintiff made his agreement with the defendant, as an agent; he, therefore, can never say he is a principal. It follows, therefore, that the present is the common case of agent and principal, in which the vendee must have his redress over. But it is insisted that the money has not been legally remitted, the return cargo being sent previous to the receipt of the cash on the note of the plaintiffs, which did not fall due till the month after the pretended remittance, as it is termed; was made. For this *Buller v. Harrison* has been cited; but if that can be attended to, it will be seen that it

(a) There was a warranty that the hops should be of like goodness as the sample, and the bulk of them were so at the time of sale. The case seems to establish this principle, that if an article be of a quality equal to what warranted at the time of sale, the vendor is not liable for subsequent deterioration, arising from a latent defect of which he was ignorant.

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is strongly in our favor. For it expressly goes to prove, that when any step has been taken on the credit of the funds received by the agent, in consequence of which his situation with regard to his principal is changed, it shall be deemed to be a payment over. Here we have acted on the faith of this note, and made a large remittance, which still leaves Young and Montell in our debt; this, *therefore, it is presumed, is a remittance; and, [*52] therefore, a perfect exoneration of the defendant.

Hoffman, in reply. If the facts in the case do not amount to a warranty, it will hardly be possible to create one. This court has decided similar circumstances to amount to a warranty, in a case where one drug was sold for another. The determination from 2 East, 814, was on a sale by sample, in which the court held the vendor not liable for a deterioration arising from the known nature of the article. And surely, as to the remittance, it is incongruous to say *that* has been sent which has not been received. It might perhaps avail between agent and principal, but not when a third person is concerned.

THOMPSON, J.—Two questions arising out of this case are presented for consideration :

1. Whether an action can be maintained to recover back the consideration money, paid under the circumstances stated in the case? and if so, then,
2. Whether the defendant, who acted only as agent or factor, can be made responsible?

From the fact stated with respect to the first point, it appears that there was no express warranty by the defendant, or any fraud in the sale. The wood was sold and purchased as *brazillette* wood, and a fair price paid for such wood, when in fact the wood was of a different quality, and of little or no value. The plaintiff's agent, who made the purchase, saw the wood when unloaded and delivered, and did not discover or know that it was of a different

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quality from that described in the bills of parcels; neither did the defendant, who was only consignee of this cargo, know that the wood was not *brazilletto*. The question then arises, whether there was an implied warranty, so as to afford redress to the plaintiffs, or whether the maxim of *caveat emptor* must be applied to them. From an examination of the decisions in courts of common law, I can find no case where an action has been sustained under similar circumstances: an express warranty, or some fraud in the sale, are deemed indispensably necessary to be shown. In the case of *Chandellor v. Lopez*, (2 Cr. Rep. 4,) in the exchequer-chamber, it was decided, that an action of trespass on the case would not lie for selling a jewel, affirming it to be a bezoar stone, *when in truth it was not, unless it be alleged that the defendant knew it was not a bezoar, or he warranted it to be such. And in the case of *Springwell v. Allen*, (2 East, 448, in note,) it was adjudged that the *scienter* or fraud was the gist of the action, when there was no warranty. Mr. Wooddeson, in his Lectures, (2 Woodd. Lec. 415,) says, in the English law, relating to this subject, a very unconscientious maxim seems long to have prevailed, which was expressed or alluded to by the words *caveat emptor*, signifying that it was the business of the buyer to be upon his guard, and that he must abide the loss of an imprudent purchase, unless the goodness and soundness of the thing sold be warranted by the seller. But this doctrine, he says, is now exploded, and a more reasonable principle has succeeded, that a fair price implies a warranty, and that a man is not supposed, in the contract of sale, to part with his money without expecting an adequate compensation.

Here we find a full and complete recognition by the commentator, that the law once was as laid down in the above cases; and the modern and improved doctrine, as he calls it, however reasonable and just it may at first seem, does not appear to be fortified and sanctioned by adjudged cases. They all determine, either that there must be an

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express warranty, or some fraud on the part of the vendor. In the case of *Bree v. Holbeck*, (Doug. 655,) *assumpsit* was brought to recover back money paid as the consideration for the assignment of a mortgage which turned out to be a forgery. The defendant being an administrator with the will annexed, and finding the mortgage among the papers of the testator, assigned it *bona fide*, not knowing it to be a forgery; and it was adjudged that he was not liable to refund, he having acted in good faith; and there being no covenant for the goodness of the title, that it was incumbent on the plaintiff to have looked to the goodness of it. And in the case of *Stewart v. Wilkins*, (Doug. 18,) it was ruled that *assumpsit* was the proper form of action where there is an express warranty; and Lord Mansfield there said, that selling for a sound price, without warranty, may be a ground for an *assumpsit*; but in such case it ought to be laid that the defendant knew of the unsoundness. 2 East, 446. Again, in the case of *Williamson v. Allison*, the same subject in some measure came under review; *and the law, as laid down in the cases of [*54] *Springwell v. Allen*, and *Chandelor v. Lopus*, above cited, was fully recognized. Fonblanque, in his valuable Treatise of Equity, (1 Fonb. 860, note h,) speaking of the justice and propriety of this principle, says, "To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is essential to the intercourse of society. These objects are attained by those rules of law which require the purchaser to apply his attention to those particulars, which may be supposed to be within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention, to those points, where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply. But even against this maxim

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he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting in good faith, *fides servanda* is the rule of law, and may be enforced, both in equity and at law." These observations, I think, apply with peculiar force in the case before us. The agent of the plaintiffs, who made the purchase, was present at the delivery of the wood; and the defect now complained of was within the reach of his observation and judgment, had he bestowed proper attention. I am satisfied that according to the settled decisions in the English courts, either an express warranty, or some fraud or deceit on the part of the vendor, is necessary to be shown, in order to entitle the purchaser to the remedy sought after in the present case. I see no injustice or inconvenience resulting from this doctrine, but, on the contrary, think it best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts. I am therefore of opinion with the defendant, on the first point, which renders it unnecessary for me to examine the other question raised on the argument.

KENT, J. This is a clear case for the defendant. If upon a sale there be neither a warranty nor deceit, the purchaser purchases at his peril. This seems to have been the ancient, and the uniform language of the English [*55] law, and *the only writer of authority, that calls this doctrine in question, is professor Wooddeson, in his Vinerian Lectures, and he does not cite any judicial decision as the basis of his opinion. In the case of *Chandelor v. Lopus*, (Cro. Jac. 4,) it was determined in the exchequer, by all the judges except one, that for selling a jewel, which was affirmed to be a bezoar stone, when it was not, no action lay, unless the defendant knew it was not a bezoar stone, or had warranted it to be one. This appears to me a case in point and decisive. And in the case of *Parkinson v. Lee*, (2 East, 814,) it was decided, that

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a fair merchantable price did not raise an implied warranty ; that if there be no warranty, and the seller sell the thing, such as he believes it to be, without fraud, he will not be liable for a latent defect. These decisions are two centuries apart, and the intermediate cases are to the same effect. Co. Litt. 102, a ; Cro. Jac. 197 ; 1 Sid. 146 ; Yelv. 21 ; 2 Ld. Raym. 1121 ; per Holt, Ch. J. ; Doug. 20. Aley, 91, cited 2 East, 498, *notis*. By the civil law, says Lord Coke, every man is bound to warrant the thing that he selleth, albeit there be no express warranty ; but the common law bindeth him not, unless there be a warranty in deed, or law. So Fitzherbert, (N. B. 94, C.) says, that if a man sell wine that is corrupted, or a horse that is diseased, and there be no warranty, it is at the buyer's peril, and his eyes and his taste ought to be his judges in that case. In the case cited from 2 East, the judges were unanimous, that the rule applied to sales of all kinds of commodities. That without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects, and that there is no instance in the English law of a contrary rule being laid down. The civil law, and the law of those countries which have adopted the civil as their common law, is more rigorous towards the seller, and make him responsible in every case for a latent defect, (see the Dig. lib. 1, tit. 2, c. 13, n. 1, which gives the very case of selling vitiated wood,) and, if the question was *res integra* in our law, I confess I should be overcome by the reasoning of the Civilians. And yet, the rule of the common law has been well and elegantly vindicated by Fonblanque, as most happily reconciling the claims of convenience with the duties of good *faith. It requires [*56] the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. And even against his want of vigilance, the purchaser may pro-

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vide, by requiring the vendor expressly to warrant the article. [1] The mentioning the wood as *brazzette* wood, in the bill of parcels, and in the advertisement some days previous to the sale, did not amount to a warranty to the plaintiffs. To make an affirmation at the time of the sale, a warranty, it must appear by evidence to be so intended; (Huller, J., 3 D. & E. 57; Carth. 90; Salk. 219;) and not to have been a mere matter of judgment and opinion, and of which the defendant had no particular knowledge. [2]

[1] In executed contracts for the sale of personal property, where there is no fraud or express warranty, the purchaser takes the property at his own risk as to quality and condition. *Moses v. Mead*, 1 Denio, 378. See in this respect also 5 Denio, 617; *Salisbury v. Stinger*, 19 Wend. 159; *Johnson v. Tins*, 2 Hill, 606; *Defreeze v. Trumper*, 1 J. R. 274; *Davis v. Mosher*, 5 J. R. 355; *Holden v. Daken*, 4 J. R. 421; *Thompson v. Ashton*, 14 J. R. 316; *Wright v. Hart*, 18 Wend. 449; *Same Case*, 17 Wend. 267; *Cunningham v. Spicer*, 13 J. R. 392; *Sando v. Taylor*, 5 J. R. 395; *Sweet v. Colgate*, 20 J. R. 196; *Snell v. Morris*, 1 J. R. 96; *Perry v. Aaron*, *Id.* 129; *Flemming v. Stocum*, 18 J. R. 403; *Case v. Boughton*, 11 Wend. 106. But where the contract is executory, it carries an obligation that it shall be at least merchantable: if it come short of this, it may be returned after the vendee has had a reasonable time to inspect it; and in an action for the recovery of the stipulated price, the vendor will be reduced to a quantum meruit. *Howard v. Hoey*, 23 Wend. 350.

It is an exception to the general rule, which implies a warranty on a sale by sample, that the bulk of the article shall correspond with the sample. *Moses v. Mead*, 1 Denio, 378. See also on this point, *Boorman v. Jenkins*, 12 Wend. 566; *Beebe v. Roberts*, *Id.* 413; *Oneida Man. Co. v. Lawrence*, 4 Cow. 440; *Gallagher v. Waring*, 9 Wend. 20; *Andrews v. Kneeland*, 6 Cow. 354; *Waring v. Mason*, 18 Wend. 425.

And in a sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril; a warranty is implied. *Moses v. Mead*, 1 Denio, 378; *Van Bracklin v. Fonda*, 12 J. R. 468. A warranty of title is also implied on the sale of a chattel. *Defreeze v. Trumper*, 1 J. R. 274; and see on this point, *Rew v. Barber*, 3 Cow. 272; *Herman v. Verroy*, 6 J. R. 5; *Sweet v. Colgate*, 20 J. R. 203; *Villard v. Johnson*, 19 J. R. 77; *McOoy v. Archer*, 3 Barb. 322; *Livingston v. Bain*, 10 Wend. 284.

[2] There are no particular words prescribed by law to make out a warranty; but it is essential that the affirmation made at the time of the sale be intended by the parties as a warranty, and not as the mere expression of an opinion by the vendor. *Sweet v. Colgate*, 20 J. R. 203; *Oneida Man. Co.*

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Here it is admitted the defendant was equally ignorant with the plaintiffs, and could have had no such intention.

The cases in which the ship, in a policy of insurance, has been described as *neutral* or American, and that description held to be a warranty, are not at all analogous to the present case. The policy is a special contract, in which the whole agreement is precisely stated, and no question was ever made in those cases, but that the assured knew, and intended to be understood to *mean*, that the vessel was of the character described. I am therefore for the defendant.

LEWIS, Ch. J. contra.

Judgment for the defendant.

 ANONYMOUS.

Practice on stipulation.

THE COURT intimated that when a stipulation (see vol. 1, p. 7, n. a.) is offered, before notice of motion, then costs will be allowed up to the time of offer. When after notice, and before actual application, up to that time. But when not till the court is applied to, then all costs must be paid.

v. Lawrence, 4 Cow. 440; *Roberts v. Morgan*, 2 Cow. 438; *Whitney v. Sutton*, 11 Wend. 441; *Duffee v. Mason*, 8 Cow. 25; *Cramer v. Bradshaw*, 10 J. R. 484; *Holden v. Dabin*, 4 J. R. 421; *Cook v. Moseley*, 13 Wend. 277; *Chapman v. Murch*, 19 J. R. 290.

Anonymous.—*The People v. James.*

ANONYMOUS.

Practice on frivolous demurrers.

It was ruled by the court, that to take the effect of a motion for judgment when a frivolous demurrer is put in, notice of bringing on the argument must be given.[1]

[*57] *THE PEOPLE *against* JAMES.

If a prisoner who has been pardoned on condition of leaving the United States within a limited time, do not depart, and is afterwards taken up for not so doing, he may, on its appearing to the court that he was deranged in his intellects, be discharged on condition of departing within the same period from the day of discharge.

THE prisoner James had been convicted of forgery and committed to the state prison. He had been pardoned by the executive, upon condition of leaving the United States within forty days. Being found in the city of New York after the expiration of the time limited for his departure from this country, he was taken up and committed to the county prison. The District Attorney obtained a rule against him, ordering him to show cause(a) why he should not be remanded under his former sentence. The prisoner being brought up and put to the bar, the record of his former conviction was produced, and his identity ascertained by his own confession.(b) It appearing, however, that he had been insane part of the time since he had been par-

[1] See *post*, *M' Cabe v. McKay*, p. 100.

(a) The same practice in *The King v. Patrick Madan*, 1 Leach's Cas. 263.

(b) See vol. 1, p. 72, *M'Neil's case*, the necessity of producing the record of a former conviction.

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doned, the whole time in ill health, and in very indigent circumstances; that he had also been in confinement several weeks for breaking the condition of his pardon, the court was pleased to order that he should be discharged, and that he should have forty days from thence, to comply with the condition of his pardon.(a)

ELY *against* HALLETT.

If the assured have information of a violent storm the day after his vessel has sailed, and he states only that there has been blowing weather on the coast, it is a misrepresentation which will avoid the policy.[1]

UPON a policy of insurance on freight of goods, the defendant relied on testimony, showing that the plaintiff was informed, prior to making the insurance, that a very severe storm had happened at Norfolk shortly after the sailing of the vessel, which would in all probability endanger her safety, and which circumstance he did not communicate to the defendant.

Upon this testimony the jury returned the following verdict: "That the plaintiff was possessed of information that a violent storm took place at Norfolk, about eleven hours after the vessel sailed, and that he did not communicate such information to the defendant. They further find, that there is no evidence to prove that such information was in the knowledge of the defendant by any other means But that a communication was generally made to the de

(a) Otherwise a venire would have been ordered instantly to try the fact, *Ratcliffe's Case*, Foster's Crown Law, 41.

[1] See *Ely v. Low*, 1 J. O. 1; *Williams v. Delapfield*, 3 Cal. R. 329; 3 Cal. R. 224; S. O. 1 J. R. 150, (2 J. R. 520.) What is a representation, see definition of, in case of *Vanderweert v. Smith*, 2 Q. R. 155; *Le Roy v. United Ins. Co.*, 1 J. R. 343.

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defendant, before he signed the policy, that there had [*58] been blowing weather, and *severe storms on the coast after the vessel had sailed; but without any reference to the particular storm first above mentioned. And they also find that the danger arising from the storm first above mentioned did increase the risk." A case stating this finding was made for the opinion of the court, whether the plaintiff was entitled to recover; if so, then judgment to be entered for him, as for total loss; if not, then for the defendant, either party to be at liberty to put the case into the form of a special verdict.

Riggs, for the plaintiff. The verdict is so imperfect that at least a new trial ought to be granted. The jury ought to have found particularly the nature and extent of the storm, before they can be warranted in drawing the inference of an increase of risk. It might have been violent at Norfolk, and yet a vessel sailing twelve hours before, might have been perfectly out of the reach of its influence, as it often happens that gales of wind are not felt at a considerable distance from any given spot. They might mean that the storm, when compared with good weather, increased the risk, but not when compared with the blowing weather which was communicated. An insured is not bound to particularize storms, and recount all that have blown. A general information is enough, because no exact line can be drawn to settle, on principle, the degree and period of the storm.

Hamilton and Boyd, contra. The finding is express that the risk was increased; this is enough; for it is a principle in concealments,^(a) that the ultimate event arising from it

(a) The rule as to concealment seems to be, that all circumstances in the knowledge of the assured only, which increase the particular risk, must be disclosed; but that general circumstances which apply to all policies of a similar description, however great they may render the risk, need not be related; because, to qualify for the avocation of an underwriter, a knowledge of such circumstances is necessary, and therefore is presumed. It follows

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is immaterial, if the hazard be augmented, because the question is, what effect would the disclosure have had on the underwriter at the time of underwriting, either as to

from the above principles, that where an interest is of a special kind, it ought to be disclosed, unless it be the duty of the underwriter to acquaint himself of it.

According to the first branch of the rule above laid down, it has been decided that a policy was vacated, where the assured had heard that a vessel like his was taken, and did not disclose it; (*Da Costa v. Scandaret*, 2 P. Wms. 170,) so where the clerk of the assured knew of the loss of the vessel upon the day on which he wrote for insurance; (*Stewart v. Dunlop*, Park, 276,) and where the agent of the assured knew of a paper stuck up at *Lloyd's*, stating the vessel underwritten had been seen at a certain place "deep and leaky," and did not disclose it, the policy was held to be void. *Lynch v. Dansford*, 14 East, 494.

Where a vessel has sailed from her port of loading, and is insured at an intermediate port "at and from," to that of her destination, "the adventure to begin from the loading," concealing that the port "at and from" whence underwritten, is not the port of loading, but an intermediate port, is fatal. *Hodgson v. Richardson*, 1 Black. Rep. 463.

Where the voyage may be completed between the time at which a vessel is expected to sail, and the day of effecting the policy; or where the relative proportion between such interval and the length of the voyage is important, not mentioning the day of sailing, or expected sailing, is a concealment; for wherever a vessel may, from such a lapse of time, be supposed a missing ship, the day of sailing, or expected sailing, must be disclosed. *Webster v. Forster*, 1 Esp. Rep. 407; *Willes and others v. Glover*, 1 N. R. 14. Therefore, upon effecting a policy for a voyage of from five to fourteen days a month after a vessel is ready to sail, that fact must be disclosed. *M'Andrews v. Bell*, 1 Esp. Rep. 373. The not specifying the time at which a vessel sails, or is expected to sail, has been held to vacate the policy, (*Johnson v. Phoenix Ins. Co.*, 1 Cond. Marsh. 470 n.(74,) unless where the jury, by a second finding for the plaintiff, after a full submission of the facts, determine it to be immaterial; (*Livingston v. Delafield*, 1 Johns. Rep. 552,) for whether the fact concealed be material or not, is for their consideration. Per Lord Mansfield, in *Hodgson v. Richardson*, *ubi sup*; *Littledale v. Dixon*, 1 N. R. 151; *Livingston v. Delafield*, *ubi sup*. And it is said that a good criterion for the regulation of the jury, is whether, in their opinion, the fact suppressed would have induced a higher premium, or a total refusal to underwrite. *Murgatroyd v. Crauford*, 3 Dall. 491.

In conformity to this principle, where it appeared in evidence that disclosing the arrival of a second fast sailing coppered vessel out of a fleet, would not have varied the premium on a dull sailer, that was not coppered,

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his premium or engaging in the contract. Materiality and immateriality of communications are for the jury, and they have determined the circumstance material. The storm was in the plaintiff's knowledge; his silence therefore

and not deemed a missing ship, the concealment of the arrival of the second vessel was held immaterial. *Littledale v. Dixon, ubi sup.*

When the voyage is from a belligerent colony to a neutral port, and thence to the mother country of the colony, that the cargo had not been landed in the neutral territory must be communicated; (*Kohne v. Ins. Co. N. A.*, 1 Cond. Marsh. 473 n.(75,)) but when the voyage is from a belligerent country to a neutral port, an ulterior destination to a belligerent colony need not; (*Steinbach v. Columbian Ins. Co.*, post, 129,) for it does not increase the risk of the particular voyage. Whatever does augment it must be told. Therefore that the insured, though a neutral citizen, carries on trade in a belligerent kingdom, must be mentioned on effecting a policy even in his own country; (*Arnold & Ramsey v. Unit. Ins. Co.*, Lex Mer. Amer. 307; *Jehel v. Rhinelander*, 2 Johns. Cas. 120; *Bodny v. Un. Ins. Co.*, 1 Cond. Marsh. 473,) so a letter of instructions containing matter which would expose the property to danger under principles of decision of a belligerent court of vice-admiralty, whether those decisions be warranted by the law of nations or not; (*Sperry v. Del. Ins. Co.*, 1 Cond. Marsh. 473 n.,) or what, according to established adjudications of belligerent courts of vice-admiralty, will be a ground of condemnation. *Marsh v. Union Ins. Co.*, id. ibid. But that a circumstance made material by an arbitrary ordinance of a foreign power, of which both parties were ignorant, and of which neither was obliged to inform himself, was not communicated, does not affect the policy; (*Mayne v. Walter*, Park, 263,) nor on a policy to an open port on lawful goods, effected by a neutral in his own country, that they were contraband of war. *Seton v. Low*, Lex Mer. Amer. 303. The reason given for this decision is, that to a neutral all goods are lawful; it might also be considered (which perhaps would be the better ground of determination) the duty of the underwriter to inform himself of their nature, for of such things there need not be any disclosure. Therefore whether a ship be home or foreign built is a subject of inquiry for the insurer; (*Long v. Duff*, *Same v. Bolton*, 2 B. & P. 209,) so is her national character, (*Elting v. Seaman*, 2 Johns. Rep. 157,) and the time of emigration of a naturalized citizen, he not being found to disclose it, though he emigrate *flagrante bello*. *Duquet v. Rhinelander*, 2 Johns. Cas. 476.

The general political relations of countries; probable political events; public affairs of general notoriety, and the assured's opinions on known subjects, need not be communicated; (*Carter v. Boehm*, 3 Burr. 1905,) nor his own conclusions on the facts he has disclosed. *Bell v. Bell*, 2 Camp. 475.

It is unnecessary to declare the ordinary mode in which the voyage in-

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vitiate the policy. The verdict is certain to a common intent, and as it is in the nature of a special verdict, the court cannot draw inferences of fact, though they may of law. The requisites asked for in the verdict, as to distance, &c., are impossible; nor is it difficult to draw the line as to communications. Not every storm, but those which enhance the risk, such as the *one now found [*59] are to be disclosed. In *Seaman v. Fonnereau*, 2 Stra. 1183, the concealment of a storm happening near where a vessel was seen, was held fatal, though she was not lost in it.

Riggs, in reply. The rules of pleading do not apply to verdicts; the one in this case is too particular for the general conclusion, and not particular enough for the present finding.

insured is conducted, however new the trade may be; (*Noble v. Kennoway*, Doug. 494; *Pelly v. Roy. Ex. Ass. Co.*, 1 Burr. 341; *Valence v. Dewar*, Park, 606,) therefore the having on board papers which, though false, are customary, need not be disclosed; (*Planche v. Fletcher*, Doug. 238; *Talcot v. Marine Ins. Co.*, 2 Johns. Rep. 130; *Le Roy v. Un. Ins. Co.*, 7 Johns. Rep. 343,) nor instructions how the master is to prosecute the voyage; (id. *Ibid.*) nor a letter referred to by a subsequent letter which is shown. *Freeland v. Glover*, 7 East, 457.

A further rule as to concealment and disclosure is, that what is impliedly warranted against need not be mentioned, though if known it would enhance the risk and increase the premium; because it is a peril at the door of the underwritten. *Haywood v. Rogers*, 4 East, 540. Therefore, on a policy at and from a port of original departure, it is not necessary to state how long the vessel has been there; (*Kemble v. Bowne*, 1 Caines' Rep. 75,) nor the necessity of repairs from injuries in a voyage preceding that insured. *Beckwith v. Sidebotham*, 1 Camp. 116; *Schoolbred v. Nutt*, Park, 300. But if an assured be asked anything, even on those points whereon he is not bound to communicate, he must speak the truth; (*Haywood v. Rogers*, *ubi sup.*) and wilful ignorance of a fact relating to the subject of insurance, of which an assured, for fraudulent purposes, keeps himself unacquainted, is tantamount to concealment. *Biays v. Union Ins. Co.*, 1 Cond. Marsh. 465, a. n. '70.

For disclosure of particular interests see *ante* p. 13, at the close of note (a.)

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THOMPSON, J. delivered the opinion of the court. The underwriter on a policy of insurance enters into contract, and computes the premium, in full confidence that the insured, being fully informed of all circumstances relating to the intended voyage, has dealt fairly with him, and has kept back nothing which it might be material for him to know. Every fact and circumstance, therefore, which can possibly influence the mind of the insurer, in determining whether he will underwrite the policy, or at what premium, is material to be disclosed, and a concealment thereof will vitiate the policy. A concealment is to be considered, not with reference to the event, but to its effect at the time of making the contract. The question, therefore, must always be, whether, under all the circumstances, there was at the time the policy was underwritten, a fair representation, or a concealment, either designed and fraudulent; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run. If we test the facts found by the jury by the principles of law above laid down, it will, we think, be found, that the concealment was such as to vitiate the policy. The information possessed by the assured was special and particular; that about eleven hours after the sailing of the vessel, a *violent* storm took place at Norfolk. The communication made to the underwriter was very general and vague; that there had been *blowing weather* and *severe storms* on the coast after the vessel sailed, but without any reference to the particular storm above mentioned. Unless the assured intended to suppress some information he had relative to this weather, we can see no reason why he did not communicate the information he had actually received. From the general communication given, the underwriter might be induced to calculate that the storm had not reached Norfolk; or that the vessel had been out so long as not to be [*60] endangered by it. The representation made to the underwriter was, that there had been blowing weather and severe storms. The information possessed by

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the assured was, that there had been a violent storm. This being the language of the jury, shows that the representation was not made in quite as forcible terms as those in which the information was received by the assured. In addition to this, the jury have found explicitly, that the storm at Norfolk did increase the risk, and that no communication of the information received by the assured relative to this storm, was made to the underwriter. The increase of the risk being matter of fact, and having been thus found by the jury, must, we think, be conclusive. We are therefore of opinion that the defendant ought to have judgment.

LEWIS, Ch. J. I cannot concur in the opinion of the court. It is rather too much to say, the communication to the underwriter must be in the very express words in which the assured has received it. The information was such as to give the defendant reason to think the risk was increased. It comprehended, in my opinion, every thing that was necessary. It is sufficient, in cases like the present, that the insurer has a substantial communication.

Judgment for the defendant.

THE PRESIDENT AND DIRECTORS OF THE MANHATTAN
COMPANY *against* MILLER.

To a plea of a judgment recovered, a replication denying the fact, may conclude to the country. A plea merely negating facts is not a special plea.[1]

THIS was an action on a promissory not in which the plaintiff had duly appeared by attorney, and the defendant

[1] As to pleading of judgments, see Code of Procedure, § 161, (see 138,) p. 66.

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pleaded a judgment recovered. To this the plaintiffs replied; but in their replication began, "And the said President and Directors of the "Manhattan Company say," &c. without mentioning by attorney, and so went on negating the whole plea, without having their replication signed by counsel, concluding to the country,(a) and adding the *similiter*, on which they went to trial and took an inquest.

Woods, on an affidavit stating these facts, moved to set the inquest aside for irregularity.

Bogert, contra. The replication is in the usual form. It is a mere negation of the plea, without alleging any new fact, and therefore not a special pleading.(b) Besides, the name of a counsel is endorsed on the back.

Per Curiam. There was no occasion for a counsel's hand; *unquestionably the plea is not special. [*61] If it was, there is the name of counsel endorsed. Besides, had it been so, it ought not to have been retained. Let the defendant take nothing by his motion, and pay the costs of resisting the application.(c)[1]

Motion denied with costs.

(a) See *Sandford v. Rogers*, 2 Wils. 113; 2 Tidd's Prac. 673; see also *Esplin v. Smalley*, Say. 208.

(b) Therefore, to a plea of payment to the payee of a note before-endorsement to the plaintiff, a general replication denying the payment is not a special plea, and does not require the signature of counsel. *Pumpelly v. Crosby*, 8 Johns. Rep. 322. But to double pleas a counsel's hand is required. *Satterlee v. Satterlee*, *ibid.* 327.

(c) The general rules are, that where a defendant cannot, without a departure, vary in his rejoinder from the matter set forth in his plea, or when the issue on the replication would be the same as that on the plea; or that on the rejoinder substantially the same as that on the plea; (*Patcher v. Sprague*,

[1] As to present practice, see Code, § 150. The defendant must demur to the reply, if the reply is objectionable, or move to strike out, &c. See *§ 150*, *passim*.

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SIMONDS *against* CATLIN.

An attorney for the plaintiff in a suit, purchasing under an execution in it, is a purchaser with notice of all irregularities in that suit. A *fi. fa.* issuing into a different county than that where the *venue* is laid, without a *testatum*, is void. So is a *fi. fa.* tested out of term. An estate will not pass by a sheriff's sale without deed, or note in writing, signed by the sheriff. Sheriffs' sales are within the statute of frauds. A return by the deputy sheriff, in his own name, as deputy sheriff, is not a return by the sheriff.

THIS was an ejectment for lands in the county of Onondaga. Upon the trial the plaintiff produced the exemplification of a judgment of this court, in the cause of Levi Barker against the defendant for debt, and entered of the term of July, 1800, in which cause the *venue* was laid in Albany. He further produced the exemplification of a *fi. fa.* directed to the sheriff of Onondaga, and tested the 9th day of August, 1800, commanding him to levy the debt and costs of the above judgment, and which execution contained an endorsement of being received by the sheriff on the 4th of October, 1800. It also contained a return annexed, in the words following, viz.

"I, Levi Sherman, under sheriff to Elnathan Beach, Esq. late sheriff, deceased, do, in pursuance of the law, and in consequence of the death of the sheriff, return, that the said sheriff sold at vendue, all that farm or tract of land in the town of Pompey, in the said county, in the occupancy of the defendant, some time in January, 1801, and before the 15th, to one Ebenezer Butler, jun. he being the highest bidder, for 26 dollars. That the said Butler did not pay the money for the same; and by order of the said sheriff, I did, on the 22d day of January aforesaid, expose

2 Johns. Rep. 462,) or where there is an affirmative on the one side, and a negative on the other, or where the replication denies the whole matter of fact, which constitutes the plea, or the plea puts in issue matter of fact, as well as matter of record, the conclusion of the plaintiff's reply should be to the country. See the learned observations of Williams, Serjeant, in *Hayman v. Gerrard*, 1 Saund. 103 n. (1)

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the said land to sale again, and that Joseph Simonds purchased the same for 50 dollars, he being the highest bidder. That the said sheriff died on the evening after the vendue last aforesaid, and before the said writ was returned. And I, the said under sheriff, do make this return this 23d January, 1801.

"LEVI SHERMAN."

The plaintiff further proved that the defendant, at the time of the sale, and at the commencement of the suit, was in possession of the premises. The defendant then moved for a nonsuit, and was overruled. He then offered to prove that the sale to E. Butler, jun. was not a [*62] ready *money sale, but at a credit; and that Butler had always been ready to pay, and that the second sale was made at the solicitation of the lessor of the plaintiff, who was the attorney in the original cause, without any notice by advertisement, and on his indemnity to the sheriff, who was then on his death-bed, and incompetent to attend to his business, and that the lessor of the plaintiff knew of the previous sale. The defendant further offered to prove, that the endorsement on the execution was made in May, 1802, at the request of the said lessor; but the testimony was overruled. The defendant then offered in evidence, a deed from the said Elnathan Beach to the said Butler, for the premises, in pursuance of the first sale, bearing date the 7th day of August, 1801, and to which deed was annexed a certificate of proof of the same before a master, by the acknowledgment of the said Levi Sherman, that he executed the same in the name of the said Beach, and as under sheriff to the same, the said Elnathan being dead, which evidence was likewise overruled, and a verdict taken for the plaintiff.

A motion was now made to set aside the verdict, for these reasons 1. That a *fi. fa.* issuing into a different county than that in which the *venue* was laid, without a *testatum*, is void; 2. That the *fi. fa.* bore test out of term;

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3. That there was no deed from the sheriff to the plaintiff;
 4. That the return of the sale contains evidence of a void sale; 5. That the evidence offered at the trial ought to have been received.

KENT, J. delivered the opinion of the court. The two first objections go to the *form* of the execution, and, considering the circumstances attending this case, the plaintiff ought in justice to be held strictly to a legal title. He was the attorney who sued out the execution, and the second sale was made on short notice, if indeed any notice was given, and he himself became the purchaser. The plaintiff is, therefore, properly chargeable with notice of every irregularity attending the execution. Prior to this motion, a rule was granted to amend the *fi. fa.* by making it a *testatum*; but as the rule was granted upon the express condition of being without prejudice to the objection to be raised in this case, and which was then pending for argument, the court are justified in putting the amendment *out of view. And there can be no doubt [*63] but that the *fi. fa.* ought to be set aside for irregularity, on the ground of the first objection, as the cases of *Allen v. Allen*, and *Brand v. Mears*, (Bl. Rep. 694; 3 D. & E. 388; see also *Barnes*, 209,) go that length even after execution executed.

The second objection to this *fi. fa.* that it bears test out of term,^(a) is equally well taken. 2 Salk, 700; 7 Mod. 80; Latch, 11; T. Jones, 150; 1 Stra. 137, 138. The process, for that reason, is held to be void, and the party suing it out cannot take advantage of it, although it may justify the sheriff, and if the case be within the reach of an amendment, yet as the amendment must always be a matter of sound discretion, we should not be inclined to grant it in the present case, for the reasons suggested.

(a) *Aliter*, if it had been returnable out of term, it would be only voidable. *Cramer v. Van Alstyne*, 9 Johns. Rep. 386.

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The next objection goes to the *merits* of the case, and is founded on the want of a conveyance from the sheriff. This is a question of importance and difficulty. It has been attended with doubt and embarrassment in our minds, but we have come to the opinion, that the estate of a defendant cannot pass at a sheriff's sale, unless by deed or note in writing, to be signed by the sheriff, as the party or agent who passes the estate.

The act directing the sale of real estates on execution, is silent as to a conveyance from the sheriff; and yet a conveyance upon such sales is dictated by the same policy that applies to all other alienations of land. Without a deed or note in writing, there would be no written document of the sale; for, in the first place, it is not requisite to the validity of the proceedings on execution, that the writ should ever be returned; nor is it requisite, even if a return be made, that the sheriff should specify with certainty the particular hands sold, or the name of the purchaser. It would be sufficient to state, that, of the lands and tenements of the defendant, he had caused to be made the debt and damages specified in the writ, as he was thereby commanded. If, therefore, the estate passes upon the sale, without any writing whatever, the general policy of the law would, in this instance, be contravened, and would be productive of manifest public inconveniences. In the county where the lands in question lie, every conveyance, whereby any lands in that county may be any way affected, in law, or [*64] equity, shall be deemed void against any subsequent purchaser, or mortgagee, for valuable consideration, unless recorded. (2 Rev. Laws, 263. The present case is not within the act, because, here is no subsequent purchaser to contend with; but cases of that kind must often rise, and if sheriffs' sales be not within the provisions of the act, it would work very great imposition and fraud. A purchaser would go to the records, and if he found no conveyance from the defendant, he would naturally conclude he might purchase in safety. But if a sheriff's sale

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is to defeat him, he would in vain seek for the evidence of it. The purchaser from the sheriff has nothing to show. There is even wanting the livery of seisin, which, in the simplicity of ancient times, and before writing was much in use, was held indispensable to the transfer of an estate. He could only ascertain the fact of the sale by the sheriff, from searching after, and examining, those who may happen to have been eye-witnesses of the transaction. We cannot think that the law intended to induce such inconvenience and uncertainty. If we were to judge of the sense of the legislature, from the various other cases in which the law is explicit, and which are cases in *pari materia*, it would leave no doubt on this question. 1 Rev. Laws, 298, 299, 302. All sales by the surveyor-general, at auction, by order of the commissioners of the land-office; sales of land by order of the court of probates, for payment of debts; sales at auction by loan-officers, of lands mortgaged to them, and sales by sheriffs for quitrents, by virtue of process from the exchequer, (and this last is a case perfectly analogous to the present,) are required to be completed by a formal conveyance from the public offices. Vol. 1, p. 324, 274, 280, 289, 295, 610. It appears to us that sheriffs' sales must be within the statute of frauds, which declares that no estates of freehold, or terms of years, shall be granted, but by deed or note in writing, or by act and operation of law. 1 Rev. Laws, 79. We need not undertake to show that a sheriff's sale is not an act and operation of law, within the meaning of this statute. These words are strictly technical, and refer to certain definite estates, such as those by the curtesy and dower, or those created by remitter 1 Ves. 221. It has been said by Lord Hurdwicke, that a judicial sale of an estate took it entirely out of the statute. The reason why it is out of the statute we do not so well comprehend; it is not because the sale is at auction, for it is settled that *those sales, if they relate [*65] to land, are within the statute of frauds. Nor does a sheriff's sale appear to us to be, in its own nature, free

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from all danger of introducing fraud, or perjury, and so, not within the mischiefs intended to be prevented by the statute.

The case in which Lord Hardwicke is said to have ruled as broadly as stated, is quite obscurely reported. 1 Bos. & Pull. 307; 1 Esp. 101; 1 Pow. 271, 272. The agreement must have been made before the master, or acquiesced in, in court; and it seems to have been more like a consent upon record than any thing else. At any rate, we cannot consider that observation in chancery, as a sufficient authority to set aside the plain letter of the statute.

We apprehend the general practice has been different and that upon sales, under the direction of a master in chancery as well as sales by sheriffs at law, the sale has uniformly been consummated by a conveyance.

This general usage ought to have great weight in a case where a statute is susceptible of two constructions; and especially, when the literal interpretation, and perhaps the reason of the thing, is in favor of the construction adopted in practice.

The minute provisions in our statute regulating sales on execution, and even the facts in the very case before us, are sufficient to show, that these kinds of sales are equally within the danger of the mischiefs which the act sought to prevent. The court of chancery, (3 Ves. 712,) itself has latterly admitted that it had gone rather too far in permitting part performance, and other circumstances, to take cases out of the statute of frauds. We are of opinion, therefore, that a sheriff's sale is within the statute of frauds.(a)

There was an ancient principle of the common law, that would, if it applied, have superseded the necessity of a deed. It was a rule, that where a thing took effect out of a naked power, or authority, it was good without deed; but where

(a) *S. P. Jackson v. Catlin*, 2 Johns. Rep. 248, affirmed on a writ of error, (8 Johns. Rep. 520,) ruling also that, although a deed be executed by a sheriff, and delivered to the attorney for the plaintiff on a *fi. fa.* to be handed over to the grantee on payment of the purchase-money, the estate does not pass to him till the money be paid.

a thing took effect out of an interest, there it must be by deed, if incorporeal; and by livery, if corporeal. In pursuance of this rule, it hath been held, that if executors be ordered in a devise to sell land, they may do it by deed, or by parol, because the vendee takes under the devise, and not under the conveyance of the executors; according to the principle, that whoever claims under the execution of a power, must make *title under the power [*66] itself. Whether this principle would, or would not, have applied to the present case, we need not now examine, for admitting that it did, we are satisfied that the statute of frauds has done it away.

The only remaining inquiry upon this head is, whether the return of the under sheriff was not a sufficient deed, or note in writing, within the act? But there are several objections to this return. In the first place, it is not, in pursuance of the statute, a return in the name of the sheriff. It is expressly a return in his own name. When a man acts in contemplation of law, by the authority, and in the name of, another, if he does an act in his own name, although alleged to be done by him as attorney, it is void. In the case of *Frontin v. Small*, the attorney executed a lease in her own name, although stated to be made for and in the name of the principal, and the lease was held to be void, because made in her own name. This case was recognized as good law, so late as the case of *Wilkes v. Back*. This return is not, therefore, an act of the sheriff, of which we can take notice. But admitting it to have been made in the name of the sheriff, it could not be a sufficient deed, or note in writing, of the sale, because it has not the requisite certainty. It does not appear what estate was sold, whether an estate for years, for life, or in fee, nor is there any certainty as to the thing sold. It is stated to be all that farm, or tract of land in Pompey, in the tenure and occupation of the defendant. But there is no kind of estimation of the quantity of land sold, nor in what part of the town it lays, or how marked and bounded. We do

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not mean to be understood to say, that a note in writing of a sheriffs' sale must be precise as to the quantity of acres, and as to the metes and bounds, but the thing sold must, in all cases, be specified with so much precision as from the description it can be reduced to certainty, and especially in the case of sheriffs' sales; for it was decided, (*Jackson, ex dem. Jones, v. Striker*, October term, 1799;) that at such sales no property could pass, but what was, at the time, ascertained and declared. This appears to us to be an excellent rule to prevent fraud and speculation at such sales, and we should be sorry to see it impaired.

A general sale by the sheriff of all that tract of land in the town of Pompey, in the tenure and occupation of the defendant, does not appear to us to comport with [*67] the rule. *It might as well have been all that tract of land in the county in his possession. We are of opinion a more definite description of the situation and amount of the land, and of the quantity of the defendant's interest therein, ought to have been stated, and that the evidence of this sale, even admitting it to have been duly made by the sheriff, has not the requisite certainty.

In England, when the sheriff extends lands by *elegit*, (Doug. 478;) he returns an inquisition, specifying the farm, the number of acres, the metes and bounds, the value, &c. Yet the statute of W. II. 13 E. I. c. 18, which gave the *elegit*, only required in general, that the sheriff deliver one half of the defendant's land, until the debt be levied upon a reasonable price, or extent. If, however, all the objections hitherto raised had been surmounted, we are of opinion that the evidence offered on the part of the defendant at the trial, ought to have been received, to show the sale was fraudulent and void. The evidence went to show that the first sale was valid and binding, and had been carried into effect by a deed from the sheriff. That the second sale was made, at the solicitation of the plaintiff, without any notice by advertisement, and on his indemnity to the sheriff, who was then on his death-bed, and incompetent to do business.

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These circumstances ought to have been left to a jury, to draw such inference from them as the case required, and it is not to be disputed but that the whole sale may be rescinded on the ground of fraud. For these reasons, we are of opinion the verdict ought to be set aside, with costs to abide the event.[1]

Motion granted.

KENDRICK *against* DELAFIELD.

In an action on a policy of insurance averring the loss by barratry, if the plaintiff show a loss from a fraudulent act of the master, the presumption of law is, that it was for his own benefit, and the assured, in order to entitle him to recover, need not affirmatively show it to have been so.

THIS was an action on an open policy, "at and from New-York "to Curracoa," on goods shipped on board the schooner *Reindeer*, and consigned, by the bills of lading, to the captain, who had been, together with the crew, provided by a person to whom the vessel was chartered. The declaration contained two counts, one stating the loss to be by the barratry of the master, the other by the perils of the sea.(a)

[1] Under the Code, where an execution is issued against real property, the real property adjudged to be sold must be sold in the county where it lies by the sheriff of the county, or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. Code of Procedure, § 287, [sec. 242.]

(a) Under a count alleging the loss by perils of the sea, if they be in truth the immediate cause of loss, the plaintiff, it seems, will be entitled to recover, though the barratrous conduct of the master occasioned the loss by such perils: as if the master, while the ship is riding in safety, wilfully cut her cable, in consequence of which she is driven on a ledge of rocks, and wrecked. *Heyman and others v. Parish*, 3 Camp. 149. Therefore, where the loss was

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From the testimony of the master, it appeared that the vessel, while chased and under a press of sail, sprung [*68] *a leak, in consequence of which he bore away for Santa Cruz; in running for which, he was obliged to throw overboard a considerable part of her cargo, in order to lighten the vessel; and even then the leak increased so much, that on his arrival at Santa Cruz, the water was up to the upper deck. This obliged him to run the vessel on shore, and sell her and her cargo. The latter was so much damaged, that the plaintiff's goods sold for about one tenth of their prime cost.

On the other hand, by the depositions of two persons, it was proved that the Reindeer was raised in seven hours after she had been sold, and that her leak proceeded from two auger holes bored in her bottom.

The jury brought in their verdict for a total loss. They were, however, requested by the judge to inform the court, whether they found the loss to be from the perils of the sea, or the fraud of the master? To this they answered, from the fraud of the master. They were then asked whether it was done for the benefit of the charterer? To establish this fact, they said, the evidence was not sufficient. They were then interrogated whether, in their opinion, they thought the evidence sufficient to show that the fraud was committed for any purpose of the captain's? To this they returned, there was not enough to enable them to determine who was to be benefited by the fraud.(a)

stated to be by capture, proof of a barratrous capture by the collusion of the captain was held to maintain the declaration. *Arcangelo v. Thompson*, 2 Camp. 620.

(a) Barratry is any act or conduct of the master or mariners in breach of the trust reposed in them, by and to the injury of the owners of the ship, though intended for their benefit, and whether the master be benefited or not. *Earle v. Rowcroft*, 8 East, 126. But as *volenti non fit injuria*, when the consent of the owners is shown there cannot be any recovery under a count for barratry. *Vallejo v. Wheeler*, 10 Wm. 143; *Hallett v. Col. Ins. Co.*, 8 Johns. Rep. 272. Where from gross negligence of the owner the mariners carry on a smuggling trade; in consequence of which the vessel is seized, the

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After the verdict thus rendered, a person of the name of Roster informed one of the owners of the schooner, that if he was not paid by him the amount of a debt due from the charterer, he would disclose the whole fraud, and tell where the very auger was bought which had bored the holes in the bottom of the Reindeer.

On these facts, and this subsequent discovery of testimony an application was made to set aside the verdict, and grant a new trial.

1. Because, to constitute barratry, it must appear that the fraud was committed for the benefit, or expected benefit of the captain.

2. Because, where a shipper consigns the shipment by the bill of lading to the captain, he cannot commit barratry by embezzlement of these goods.

3. Because new testimony has been discovered since the *trial, which it was not in the power of the [**69] defendant to have obtained before.

Pendleton, for the defendant. Barratry must be some act done by the master for his own benefit, (a) to the prejudice of his owners, and so proved, 2 Marsh. 445, 456. n. (a). It must be with an intention to defraud the owners. *Phynn v. Roy. Ex. Ass.*, 7 D. & E. 505. *Moss v. Byrom*, 6 D. & E. 379. *Hague v. Bordieu*, 1 D. & E. (b) The finding,

underwriter is discharged. *Pipon v. Cope*, 1 Camp. 434. Such negligence amounting to a consent. That the barratrous act is for the benefit of the master, is only an evidence of his fraudulent conduct. Per Aston, J., in *Vallejo v. Wheeler*, Cowp. 155, as explained by Lord Ellenborough, in 8 East, 137. See also *Steinbach v. Ogden*, 3 Caines' Rep. 1, and *Suckley v. DeLafield*, post, 222. For a variety of decisions on barratry, by no means reconcilable, see 2 Cond. Marsh. 534, a. n. (54,) and *Osikoun v. Soc. Co. France*, 1 Binn. 293.

(a) Therefore it has been held, that though the master do the act for the benefit of himself and owners, it is not barratry, notwithstanding it be unknown to the owners. *Hood's Executors v. Nisbit*, 2 Del. 137.

(b) In that case, however, it was expressly decided barratry could not arise between the master and shipper of goods. In the principal case, the

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therefore, wants this ingredient. To fix the loss on the underwriters, it should state on whose account. The return of the master to be examined, is a proof that his actions were for the benefit of his owner—the owner *pro hac vice*. Secondly, when the character of the captain is changed into that of a consignee, he becomes the agent of his principal, the shipper; and though he may be liable for misconduct, it cannot be barratry so as to charge the underwriters. This principle is recognized in *Fitzherbert v. Mather*, 1 Marsh. 840, where the act of the agent exonerated the insurer, though the assured was perfectly innocent of the misrepresentation; but in the present case the owner may well be presumed to have colluded for the fraudulent purpose. The bill of lading vests the property in the consignee, when possession of the goods passes with the bill. The consignor is then a *cestui que trust*, and the consignee accountable only on the equitable principles of the law. Had the goods been sold by the master at any intermediate port, the sale would have bound the property. The character of captain is lost in that of consignee; for the owners of a vessel are liable for their captain's acts only so long as he continues a simple carrier on their account. 2 Marsh. 444, after mentioning the Roman law, goes on and states that if the captain be commissioned to dispose of an adventure on board, the insurer of such adventure shall not be answerable for the loss of it; for this would make the insurer answerable to the insured for the faults of his own agents. The expectation of fully showing, on a new trial, the fraud, from the testimony discovered, will, at least, induce the sending back for another investigation.

ship was chartered by the owner of the cargo, so that he was owner *pro hac vice*. *Vallejo v. Wheeler*, Cowp 143. Therefore, when the master hires the vessel for the voyage, he cannot commit barratry. *Hallett v. Col. Ins. Co.*, 8 Johns. Rep. 272. But though a vessel be let to hire, if the owner man, and victual, and pay wages, the freighter is not owner, and a deviation by consent of the freighter only is barratry. *M'Intyre v. Bowne*, 1 Johns. Rep. 222.

Hoffman and Riggs, contra. The affidavit of newly discovered testimony is too loose; it ought to have specified a time when it might be expected to obtain the witness by whom it is to be shown, and have also gone to a full belief *of its truth. The jury had the whole [*70] evidence before them; and, if they believed the captain, it was ample. The plaintiff rested his cause there. The defendant set up the fraud of the master, and as it was relied on as a defence, it was incumbent on the insurer to show for whose benefit, because that is necessary to prove it was not barratry. To constitute an act barratry, it is enough to show it a pure fraud; for every species of fraud, cheating, &c. of the master, is barratry, without the plaintiff's proving on whose account or for whose benefit committed. Marsh. 442; Millar, 105, 158. In a count for barratry, it is sufficient to state the loss by the fraud of the master, and it is unnecessary to prove more than is alleged. Barratry may also be as well in respect to the cargo as the vessel. *Lewin v. Suasso*, Postle. Dic. v. 1, p. 147; Marsh. 452, 453. The ownership, therefore, of one, does not affect the other subject. Millar, 165, 167. Therefore, though the fraud of the *hac vice* owner, or his orders, might have prevented barratry as to his goods, it will not do away the effect as to the property of another, or an innocent shipper. Marshall, in page 444, where he cites Emerigon, tom. 1, 370, mistakes the sense of the author. Emerigon says, the captain, though consignee, may, whilst he continues acting as captain, be guilty of barratry(a) against the cargo consigned, but not after they are on shore.

When both characters are united, the former does not attach till the latter has expired; for the consignee has no right over the goods till the voyage is at an end. This principle is found in cases of abandonment, where, till that period, the captain is agent for the owner of the ship, but afterwards he becomes that of the assurer. Besides, the

(a) So though he be supercargo. *Earle v. Rowcroft*, 3 East, 140.

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presumption of law is that every man who commits a fraud does it for his own benefit, and not for that of his owners. Millar, 173. *Ross v. Hunter*, Marsh, 466, 467.

Pendleton and Hamilton, in reply. *Nutt v. Bordieu* was the case of an innocent shipper, and yet because the fraud there was with the knowledge of the shipowner, it was decided not to be barratry, though the sentence in France had pronounced that it was; for it must be an act against the duty to the owner of the ship. The intent is part of the offence, and ought to be shown. Of this, the jury answer, there was no proof. In *Ross v. Hunter*, [*71] 4 D. & E. 38, the act was proved to have been *done for the benefit of the captain. To show the character of master is sunk in that of consignee, had a shipper consigning goods to a captain brought an action against the owners for an embezzlement by the master, could there be a recovery? The argument from the innocence of the shipper is of no force, because barratry is a technical offence. Want of seaworthiness avoids a policy, though certainly no crime in the shipper. The contract in both cases is founded on certain fixed understandings. The assurer being liable for barratry only when established, it must be proved by him who claims the benefit of that part of the engagement.

THOMPSON, J. The first question that appears to arise out of this case is, what we are to understand by the term barratry in a policy of insurance. In the case of *Nutt v. Bordieu*, (D. & E. 380,) Lord Mansfield says, barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. An owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. It cannot be committed against the owner, with his consent, for though the owner may become

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liable, by the misbehavior of the captain, if he consents, yet that is not barratry. It must partake of something criminal, or fraudulent, and to the prejudice of the owner. Park. 84; Cowp. 155. We may therefore define barratry to be some fraudulent act of the master or mariners, tending to their own benefit, to the prejudice of the owner of the vessel, without his privity or consent. George Martin, the charterer of the vessel, must be considered the owner *pro hac vice*, so that if any fraud has been committed on the owner, it must be on him. The jury find that the loss was occasioned by the fraud of the master. But who was to be benefited or prejudiced by this fraud, the jury would not undertake to say; or whether committed with or without the knowledge of the owner, is not found. It appears to me, therefore, that the finding of the jury is nothing more than that the loss was occasioned by the fraud of the master, which is an imperfect verdict; that, of itself, not amounting to barratry. The jury, by their answers to the questions put by the court, have negatived some of the *material facts, necessary to constitute the [*72] charge of barratry. That there has been a gross fraud committed, I think manifestly appears, and to subject the underwriter to the payment of the loss would seem to savor of injustice. If this fraud was practised with the knowledge and consent of the owner of the vessel, it would make him responsible, and discharge the underwriter. The case presents very considerable doubt and difficulty, and I think, for the purposes of substantial justice, another examination of the cause is necessary, and that a new trial ought to be granted, more especially, as some affidavits have been offered of the discovery of testimony since the trial, tending to show, though rather remotely, that George Martin was privy to this fraud.

KENT, J. I do not think that it is essential to be made appear that the fraud was committed for the benefit of the master. If the master commits a fraudulent act, in his

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character of master, it is barratry. 2 Marsh. 444, 452. It is a criminal breach of duty in the relation in which he stands to the owner of the ship. The person to be benefited by the barratry need not be made affirmatively to appear. It is sufficient that the act was done with a fraudulent intent, and done by the captain, in his character of captain, and in *breach* of his duty and relation as captain. The law will *intend* that it was done to the injury of the owner, until the contrary appears. Nor did the consignment of the plaintiff's cargo to the captain alter the case. The fraud of the master was not committed in the character of consignee of the plaintiff's cargo, but in his character of master of the vessel. This is the true distinction on the subject, and which reconciles the doctrine in *Emerigon* with the plaintiff's claim in the present case. The captain did not, and could not, lay aside his character and responsibility as master, until the vessel had performed her voyage, and arrived at the port of destination. The accidental circumstance of the character of consignee being added to that of master, could not qualify or alter his acts as master; the two characters were totally distinct. The only question in this case that remains, is on the discovery of new testimony. I have examined the affidavit of William Wilmerding; it relates some information he received of Peter Van Wagener, who told him that one [*78] Foster, whose residence is unknown, *had called on him for some money that George Martin, who had chartered the schooner for that voyage, had promised to pay him, and threatened to disclose the whole fraud relative to the loss of the vessel. This affidavit does not even charge Martin with a concern or privity in the fraud, and leaves it only to be implied from the threat. It is a question whether even barratry, with the concurrence of the owners of goods, will exempt the insurer of goods belonging to an innocent shipper. Miller, 165, 167; Marsh. 452. The English authorities do, however, look very strongly to the opinion, that the insurer would not, in such case, be re-

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sponsible. Assuming the law to be so, the question is on the weight of this newly discovered testimony; and, in my opinion, the evidence is altogether too loose and uncertain. There is nothing positive, or from which we can deduce any conclusion. To grant a new trial on this suggestion merely, would be to allow the party to fish for testimony, and would introduce endless contention on the subject of new trials. Even if Foster's testimony was more definite, there is no reasonable ground to expect it could be procured. He was probably a seaman, and it appears that it is not known where he is, or where he resides. I am of opinion, therefore, that the plaintiff is entitled to judgment, and that the motion for a new trial be denied.

LEWIS, Ch. J. I concur in the opinion last given. It is immaterial who was owner in this case. For, as the fraudulent act does not appear to have been done for the benefit of any particular person, the law will necessarily presume it has been for the advantage of the perpetrator.

LIVINGSTON and SPENCER, Justices, gave no opinion.

New trial denied.

(1) As to decisions concerning barratry, see *M'Intyre v. Bowne*, 1 J. R. 229; *Steinbach v. Ogden*, 3 Cal. R. 1; *Hallett v. Col. Ins. Co.*, 3 J. R. 272; *Thurston v. Caine*, 3 Cal. R. 89; *Cook v. Com. Ins. Co.*, 11 J. R. 40; *Grim v. Phoenix Ins. Co.*, 13 J. R. 451; *Voe v. United Ins. Co.*, 2 J. C. 180; *Grim v. Phoenix Ins. Co.*, 13 J. R. 459; S. C. ib. 460; *Stuckley v. Delafield*, 2 Cal. R. 222.

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E. AND C. GOOLD *against* THE UNITED INSURANCE
COMPANY.

An assignment of part of the subject insured to a belligerent, though after capture, is a breach of a warranty of neutral property.

THIS was an action on a policy of insurance, on account of Patrick Ferrall, a Danish subject, at and from the Havana to Kingston, in Jamaica, upon twenty bags, containing 20,000 Spanish milled dollars, warranted to be Danish property. The money was part of the returned proceeds of a cargo of negroes brought from St. Thomas, in the [*74] Danish schooner John, and now shipped in *her on the voyage insured. For this sum two bills of lading were, on the 10th of January, 1798, signed, one by Thomas Taggart, the other by William Bayley, but both of the same tenor and date, purporting to be for 20,000 dollars, shipped by Henry Amoresta on board the schooner John, William Bayley master, bound for St. Thomas, on account and risk of Patrick Ferrall, a burger and inhabitant of St. Croix, he paying freight, nothing, being owner's goods. On the 12th of the same month, the John sailed on the voyage insured, with a Danish register, and other documents on board, showing her Danish property. On the 20th she was captured and carried into St. Jago de Ouba, where she was libelled in an admiralty court established there. In the proceedings it appeared that the John had not any custom-house papers on board, showing her destination to be for St. Thomas, nor any thing from which it could be gathered, except the bills of lading before mentioned, both of which were at the time of capture delivered up; that the captain, in answer to an interrogatory put to him, said, the vessel was in the service of the Spanish government, under an agreement to furnish them with negroes, and of course entitled to enter and depart without papers; that by a letter on board from Amoresta to Ferrall,

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it was mentioned that the captain had consigned himself to Amoresta, who by the John, had then forwarded the 20,000 dollars, as a part of the sales of his negroes; that two of the seamen swore, at the time of the capture Thoms Taggart commanded the vessel, and then passed for Bayley, directing the crew so to call him; that this was contradicted by a positive affidavit made by Bayley, setting forth that Taggart was to have gone as captain, but that afterwards he the deponent was appointed, and that the sailors had been suborned and corrupted to swear as they did. These proceedings being to be forwarded to the tribunal of captures at Cape Francois, Bayley, on the 6th of February, in order to interpose his claim for vessel and cargo embarked for that place on board the privateer, but was captured and carried into Kingston, in Jamaica. On the 12th of the same month, in consequence of previous instructions regularly given, the defendants underwrote the *policy in question, at 15 per cent. on the following [*75]. communication: "Edward Goold & Son want insurance on specie in the schooner John, Captain Balie from Havana to Kingston, Jamaica. This vessel goes up as if bound to St. Thomas, for which island bills of lading for the money are signed, but when she gets to the east end of the island of Cuba, bears away for Kingston, Jamaica. The property Danish." On the 20th, Ferrall, in order to secure Amoresta for the amount of advances made, transferred to him one half of the interest in the subject insured.(a) On the 6th of March, the tribunal of captures pronounced a decree condemning vessel and cargo, as lawful prize to the captors. The sentence refers to the 12th article of the decree of the 21st October, 1744, and the 9th article of the decree of the 26th of July, 1778, confirmed by the article of the executive directory of the 12th ventose, which ordain, "That all foreign vessels, on board of which is found a merchant's

(a) This by a letter from Ferrall to the plaintiff, dated July the 31st, and read in the argument, is explained to mean half the insurance.

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supercargo, clerk, or major officer of an enemy's country, or of which the equipage consists of more than one third of the sailors of subjects from enemy's countries, or those that are not provided with a *role d'equipage*, attested by the public officers of the neutral countries where the vessels sail from, are considered as lawful prizes." It then goes on to state as reasons for confiscating, the want of a *role d'equipage*, of bills of lading, and invoices of the cargo from St. Thomas; the having given an invoice to the supercargo; his refusal to be examined; the having no clearance or papers on board to show the destination; the master's passing as another person; the omission in case there had been a change of commander of having that circumstance authenticated by a document from some public officer at the port of his departure, and the answers of the captain when on interrogatories.

A day or two after the promulgation of this decree, Bayley arrived at the Cape, where, on the 9th of March, he presented to the tribunal of captures a memorial requesting a rehearing. In this he, after pledging himself to disprove the principal facts, accounts for the want of a *role d'equipage* of his crew on the former voyage, by saying, that his cargo from St. Thomas consisted of negroes who worked the vessel, and that, on the voyage in which he [*76] was captured, *he had one; but it had been taken from him by the English, when they made prize of the privateer which he was on board of.

On this memorial a rehearing was had, in which the former sentence was confirmed, adding, as a further reason, (but without noticing the want of a clearance,) that the imposition in passing for Bayley, was evident from the signature to the two petitions being signed "Balay," and the signature of the bill of lading "Bayley." That also in his petition to committee, he began to sign "Bal" instead of "Bay."

After this affirmation of the judgment in the inferior court, Amoresta put in a claim for the property as his own,

which was, on the 26th June, 1798, dismissed with costs and damages. Interest, loss, and abandonment, were admitted.

Upon these facts a verdict was taken for the plaintiff, subject to the opinion of the court, upon the whole matter, whether it should stand, or judgment of nonsuit be entered. But as the decision turned only on the effect of the transfer on the warranty, it is needless to detail the arguments on any other point.

Hoffman, for the plaintiffs. The warranty is not affected by the transfer to Amoresta; it being subsequent to both the underwriting the policy and capture of the vessel. It is sufficient if the warranty was complied with at the time of sailing, and is not altered by any act of the assured during the continuance of the voyage. *Elen v. Parkinson*, Doug. 732.(a) *Saloucci v. Johnson*, Park, 364, and admitted in *Tyson v. Gurney*, 3 D. & E. 477. The transfer was after the voyage had been defeated, and a technical loss induced by the capture. This, too, for the sake of recovering the property.

Harison and Troup, contra. The property warranted neutral, must be so not only at the inception, but continue so during the prosecution of the voyage, and even after capture;(b) for otherwise it may take away the right of the insurer after the abandonment to recover. After an original compliance with the warranty of neutral property, a transfer by the assured to a belligerent operates as a condition subsequent, and defeats the contract from that time. This distinguishes it from a want of neutrality at the commencement. In that case, as the policy never attached,

(a) See *Furtado v. Rogers*, 3 Bos. & Pull. 191, that an insurance effected in Great Britain on a French ship, previous to hostilities, does not cover a loss by British capture.

(b) This position must be taken with the qualification of "for or by reason of any wilful act of the assured."

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[*77] the premium, *if there has been no fraud, may be demanded, but in this it cannot. The effect of such a transaction may be very prejudicial. Suppose there had been a restoration, and the vessel in proceeding on her voyage had been taken by an English cruiser, a condemnation must have ensued. The transfer, too, could not have been of a part of the insurance; it must have been for the whole of the property, as a claim was put in for the whole, which could not have been at all supported, without a proof of actual assignment.

Hamilton, in reply. The *quo animo* must decide the transfer. If to merely secure for advances, and the claim interposed to rescue the property from the fangs of the captors in aid of the insurer, it ought never to prejudice the insured.

SPENCER, J delivered the opinion of the court. The plaintiffs' counsel have attempted to show that the transfer to *Amoresta* was only an assignment of the insurance, and not of the vessel or money; this is a refinement not warranted by the fact: and though it be true that upon a warranty of neutrality the happening of an event which changes the neutral character, without any act of the party, will not be considered a breach of the warranty; yet it is equally true that the party who so engages for the neutrality of the subject insured, cannot himself change the neutral character of the subject without the forfeiture of his right on the policy.(a) Here Ferrall, after capture, but before condemnation, assigned one half of the subject insured to one of the belligerents, and thereby infringed his warranty. It is not any answer to the objection to say that the condemnation was not on this ground; or that this was after capture; the loss was not consummated until

(a) Doug. 705. The parties themselves cannot change the nature of the policy.

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condemnation. The warranty has not been complied with, and the transfer might have increased the risk. On this ground, the court is of opinion that by the transfer to Amoresta, the insurers are discharged, and that, therefore, judgment of nonsuit be entered.

Judgment of nonsuit.

MILWARD *against* HALLETT.

A master of a ship who has drawn a bill on his owner for the amount of money advanced to him to pay exporting duties on a cargo delivered to his owner, and to enable him to return home with his vessel, is a competent witness, without a release, in an action by the person lending the money against the owner, though the bill be unaccepted, as he is equally liable to both parties. A master of a ship can bind his owner by a bill of exchange drawn for necessities.

THIS was an action on the usual money counts, to recover a sum advanced to the captain of the defendant's ship when abroad, and for which the captain had drawn bills upon his owner, who had refused to accept them.

*Some time in January, 1801, the vessel sailed [*78] from Philadelphia to Port Republican, in Hispanolia, under a charter party to James Yard, of Philadelphia. In February she arrived at her place of destination, had discharged her outward cargo, and taken in part of one for Europe, pursuant to her charter party, when information was received that Yard had become a bankrupt. Upon this (according to the testimony of James Hussey, the master of the vessel, who was admitted as a witness) Chambaud, the merchant in Port Republican to whom the ship was addressed, refused to furnish any more of her lading, and demanded restitution of that which had already been put on board. The master refusing to comply with this, legal proceedings were thereupon commenced to enforce

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a redelivery. These, however, failed; but the master was, notwithstanding, prevented from sailing with his cargo, by the French admiral, who threatened that unless the cargo was relanded, he would detain the vessel till a court from the first counsel should sit, before which time the bottom of the vessel would probably drop out. Upon this the master, supposing it best for the interest of all concerned gave up part of his cargo, retaining only 85 hogsheads of sugar, and a quantity of logwood. For the purpose of paying the exporting duties on these goods, and the necessary expenses of the ship in consequence of this detention, the money in question was borrowed. The voyage being thus broken up, Captain Hussey returned to New York with the ship, and delivered her, together with 85 hogsheads of sugar, and 30,000 weight of logwood, to the defendant, and rendered him a full account of all his transactions. On the part of the defendant the deposition of the mate was read in evidence. He testified that the principal part of the outward cargo belonged to Yard; that the defendant had on board 35 barrels of prime pork, and 20 of beef, over and above the ship's stores, together with 36,000 bricks. That there was some property on board belonging to other persons which the master sold, and received the proceeds. That the freight of these must have amounted to upwards of 100 dollars. That the part of the cargo relanded by Captain Hussey was delivered up, contrary to the express directions of the defendant, which the captain had received, and showed to the wit-
[*79] ness. That *Hussey told him that the exporting duties on the sugar retained, and the expenses of relanding the others, amounted to eleven or twelve hundred dollars. The mate also swore there were no other expenses of any consequence attending the ship, except the repairing of a fore-yard, which cost about thirty-six dollars. The jury having found for the plaintiff, a motion was now made to set aside the verdict, and grant a new trial, upon the following grounds: 1. Because Hussey was

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an incompetent witness, without being released by the plaintiff; 2. Because it was not in his power to bind the defendant by the contract which he made with the plaintiff.

Boyd, for the defendant. Supposing the general reasoning of equal liability to be good, it does not hold in the present case. Hussey is liable to the plaintiff, in damages, to the amount of 10 or 20 per cent. on his protested bill. This, therefore, gives a preponderance of interest in favor of the plaintiff. The case from 7 D. & E. which may be relied on by the plaintiff, was not like this. It was determined on the necessity of receiving the testimony offered. But the captain could not bind his owner in this way. He can do it only through the medium of his ship. The case shows the money was borrowed to extricate the property of Yard, and pay the exporting duties of the sugar. The receipt of it does not give the defendant any right to it, for as Yard has become a bankrupt, it is, by the operation of the 10th section of the bankrupt law, vested in his assignees, by whom we are liable to be called on.

Caines, contra. *Evans v. Williams*, 7 D. & E. 481, (n.) is in point. The case runs *quatuor pedibus* with this. The captain of an Indiaman drew a bill on his owners for money expended on account of the ship. He was held a good witness, because equally liable.^(a) The *quantum*

(a) If the rule antecedently laid down (*Peyton v. Hallett*, 1 Caines' Rep. 267 n. (a)) respecting the incompetency of witnesses be correct, the inverse of its principle will determine their competency. When, therefore, the legal effect of the verdict will not operate to the immediate advantage or disadvantage of a person testifying, such person is a competent witness. From this principle it follows, 1. That parties to the record are admissible, when it appears judicially, from the proceedings in the suit, that their liability is determined or merely possible; as in an indictment for an assault and battery, one defendant, who has submitted and been fined, for the other; (*Rees v. Fletcher*, 1 Stra. 633,) a co-defendant in trover, after judgment against him

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of liability cannot be considered by the court. That would be to try the respective causes, and settle on the bench the amount of verdicts. That a master can bind his owners by a bill drawn upon them, on account of

by default, to show that the other never intermeddled; *Ward v. Haydon & Venton*, 2 Esp. Rep. 552,) so in trespass, to exculpate, but not to inculpate, him by testifying for the plaintiff, and putting it in his power to levy all against the other; *Chapman v. Graves*, per Le Blanc, J., 2 Camp. 333 n.) *aliter*, if the co-trespasser be not made a defendant; (Id. *ibid.*) overruling, in this respect, *Barnard v. Dawson*, cited in the same case, and stated 1 Caines' Rep. 367 n. (a.) which, however, does not seem to be law; for a verdict and judgment, without satisfaction, would be no defence to the witness. Besides, the distinction of Le Blanc is rather shaken by Lord Ellenborough, who allowed a co-defendant in ejectment, against whom judgment had gone by default, to prove the other defendant in possession, it being a mere possibility that the plaintiff would go against him alone for the meane profits; (*Doe v. Green*, 4 Esp. Rep. 197,) so those in the *simul cum* in trespass if nothing be proved against them; (Sty. 401.) or, if they have made satisfaction, to prove it; (*Popple v. James*, Bull. N. P. 286,) so when a witness does not appear individually on the record, though he may be one of the body who do, if it be shown that he has no kind of interest; as a mere trustee for a public charity who is one of a corporation, sued by its corporate name. *Weller v. Governor, &c., of the Foundling Hospital*, Peake's Cas. 153, before Kenyon, Ch. J. In Pennsylvania a plaintiff on the record who was a certificated bankrupt, and had released his interest at the bar, was held competent in a suit carried on for the benefit of his estate, but in which his assignees had given security for the costs; (*McEwen v. Gibbs*, 4 Dall. 137,) so when the party to the record in whose favor the rule of exclusion would operate, is willing to waive its benefit, and the other consents to be examined; as one of two plaintiffs, in behalf of the defendant; (*Williamson v. Twissell & Norden*, 1 Tann. 378,) in the report of which, as printed in the New York edition by Riley, the parties appear to be reversed.

2. Persons interested in the subject matter of the suit when their interests would be unaffected by the event, and must necessarily remain the same, whether the verdict be for the plaintiff or defendant; as tenant in fee of the inheritance to prove the lease in an ejectment, where both plaintiff and defendant claim under him; (*Fox v. Stann*, Sty. 452,) or an original lessor, under whose lessee the defendant holds, to prove whether he demise first to the plaintiff, or another person; (*Bell v. Harewood*, 3 D. & R. 308,) or a purchaser, who has recovered judgment against the defendant for a fraud in selling land to which he had no title, to testify in another action for the plaintiff, who had bought under the same sale; (*Fairchild v. Shack*, 1 Day's Cases in Error, 266,) so when the interest is not beneficial, but fiduciary;

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their vessel, was settled in *Sinsum v. Braginton*, 1 Ves. sen. 443, and in *Cary v. White*, 1 Bro. Parl. Cas. 284. Necessity requires it; for many persons will not lend on bottomry, *who may advance on bills. Every [*80]

as an executor in trust, though he has acted; (*Lowe v. Joliffe*, 1 Black. 365; *Cornwall v. Isham*, 1 Day's Cases in Error, 35,) or an assignee in trust, to show that he had no real interest, where the conveyance is by the *cestui que trust*, in whose name the suit is brought. *Wilson v. Speed*, 3 Cranch, 283.

3. When the interest is merely a possible or consequential, but not certain or immediate result of the verdict, as a steward of a court, to prove a fine due to the lord on admissions during his minority, though on such the witness would be entitled to a fee; (*Champion v. Atkinson*, 3 Keb. 90,) or a person who expects to be a deputy to the party for whom he testifies, should he obtain an office, which he seeks to avoid in a *scire facias*; (*Hanning's Case*, 1 Mod. 21,) or, on a justification in trespass that the *locus in quo* is a highway, the owner of an adjoining lot who has agreed to let the defendant pass across it for a certain rent, which privilege cannot be enjoyed without establishing the road; (*Pollard v. Scott*, Peake's Cas. 18,) so where the interest is a consequential right to an office of mere authority, that is not beneficiary. *The King v. Bray*, Cas. temp. Hardw. 358.

4. Where the interest in a fund is transferred; as that of a creditor who has sold his chance of recovering a debt to a third person, to testify for him. *Granger v. Furlong*, 1 Stra. 507; 2 Black. 1273, S. C.

5. Where the interest which did exist becomes impossible; as that out of the future profits of an adventure in goods which are lost before sold. *Robertson v. French*, 4 Esp. Rep. 246, or,

6. Where it is in any way destroyed, as that of a borrower of money on usurious terms, to prove, after payment of the debt, the fact of usury; (*Smith v. Prager*, 2 Esp. Rep. 486; *Pettingal v. Brown*, ante, vol. 1, p. 168,) or a drawer of a bill, who has not received due notice, to prove, in an action against the acceptor, that it is paid. *Humphrey v. Moxon*, Peake's Cas. 53.

7. Where the interest is not immediate on the fund, though the witness may ultimately be paid out of it, as a creditor of a bankrupt, who has not proved his debt, to support the commission. *Williams v. Stevens*, 2 Camp. 300.

8. Where it remains unaltered, as that of a certificated bankrupt under the law of the United States, to testify in favor of his estate when it will not pay 25 per cent. *Phoenix v. Dey and others*, 5 Johns. Rep. 412.

9. Where it is only in the general ability of the party to pay, and creates no new liability to the witness, as an agent entitled to a commission on goods sold, to prove the sale and delivery; (*Dixon and others v. Cooper*, 3 Wils. 40,) or a creditor to testify for his debtor, though suing for the recovery of the amount of the very goods for which the debtor is liable to him. *White v. Baring, et al.*, 4 Esp. Rep. 22.

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agent has an implied authority to bind his principal respecting the subject matter of his agency. The appointment to the command of a vessel is a certificate of confidence by the owner, and equal to a letter of credit respect-

10. Where the interest in the event of the suit is a mere possible, and not necessary liability in consequence of the verdict; as that of a mere liability to a rate that may be imposed, but is not in fact laid; (*The King v. Prosser*, 4 D. & E. 17; *The King v. South Lynn*, 5 D. & E. 664; *The King v. Little Lumley*, 6 D. & E. 151; *Falls v. Belknap*, 1 Johns. Rep. 486,) or to an information in the nature of a *quo warranto*, if the right of the party for whom called be disturbed; (*The King v. Bray*, Cas. temp. Hardw. 358,) or that of a sub-lessee of lands let out under a covenant for particular cultivation, to show there was no breach; (*Wishaw v. Barnes*, 1 Camp. 341,) or that of a person who expects to be called on for costs, but is not bound to contribute to them; (*Bent v. Baker*, 3 D. & E. 27,) or, who considers himself bound in honor only; (*Pederson v. Skoffes*, 1 Camp. 144, contra *Fotheringham v. Greenwood*, 1 Stra., and the doubt expressed in *Coleman v. Wise*, 2 Johns. Rep. 165,) upon which point, however, the court have in a late case laid down the rule, (*Trustees of Lansingburgh v. Willard*, 8 Johns. Rep. 428,) that an ideal interest in a witness, if so circumstanced that it cannot be released by the party calling him, shall disqualify him as a witness for, though he may be a witness against such party: a principle that seems to recognize a legal nonentity, as a legal disqualification, contrary to the position that the law acknowledges only legal consequences. The rule seems also to be impugned by a more recent decision, (*Gilpin v. Vincent*, 9 Johns. Rep. 219,) in which the court say, that as the contribution to the suit (which was the ground of incompetency urged) depended on the volition of the witness, and on the contingency of his being asked, and upon his sense of the general practice and principles on such occasions, "there was no fixed or certain legal interest," to disqualify, and the witness therefore competent.

11. Where the interest is a liability to the party for whom called, only when the other party is liable to him, as a payee to prove, for an endorsee, that the defendant, who drew the bill, had promised payment after it became due. *Stevens v. Lynch*, 2 Camp. 332.

12. Where, though it be to exonerate himself in the suit in which he testifies, it makes him liable over; as a joint debtor, to prove that money of his co-debtor's was in the hands of the defendant as garnishee in an attachment issued against the co-debtors. *McLeod v. Johnson*, 4 Johns. Rep. 126.

13. Where the interest from liability is removed; as an owner of a vessel who has paid to a shipper of money more than the amount for which bills of lading were signed and been reimbursed by his captain, to testify for him in his suit against the shipper for the money so paid. *Cortes v. Billings*, 1 Johns. Cas. 270.

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ing his ship. It is enough, if she be in difficulty, to authorize any one to lend. The visible necessity of the vessel is all a lender is bound to look to. If she cannot depart without money, he is warranted in advancing, and

14. When the witness's liability in the suit remains unaltered, as that of a person who has sold a horse with a warranty of his soundness, to prove that he was so when he sold him, in an action on a similar warranty against a subsequent vendor; (*Briggs v. Crick*, 5 Esp. Rep. 99,) or a joint seller of lands to which he had no title, for the other sellers who were sued in an action on the case for the same fraud; (*Phelps v. Winchell*, 1 Day's Cases in Error, 269,) or a commoner testifying for a prescriptive right in a fellow commoner in a particular estate, though he may have correspondent rights. *Baker v. Benet*, 3 D. & E. 33.

15. When the liability is on another point than that for which called; as a deputy jailer who has taken a bond to the sheriff for the liberties, to testify for the sheriff in an action against him for an escape of a prisoner in the custody of the deputy. *Stewart v. Kip*, 5 Johns. Rep. 256.

16. A witness, though liable to the defendant, if the plaintiff's case turn out differently from what stated, is nevertheless competent to prove it, if the defendant would still be liable to the plaintiff; as a captain to prove a vessel not seaworthy in an action against the owner for negligently carrying goods freighted. *Lay v. Hollock*, Peake, 101.

17. There is a class of persons who are said to be witnesses from necessity, such as agents, factors, brokers, and others who act between the parties to a suit; but perhaps the principle would be more accurately laid down by saying, that all persons in the mutual confidence of parties litigant are competent witnesses between them, on the subject in which employed; as a book-keeper, to whom goods were delivered, to prove their direction; (*Spencer v. Goulding, et al.*, Peake, 129,) or a servant, to whom money has been paid for his master, to show that it was given into his hands; (*Mathews v. Haydon*, 2 Esp. 509,) so to prove that goods, for which he had an order in his favor, were delivered over to the defendant; (*Burkingham v. Deyer*, 2 Johns. Rep. 189,) or an agent, who applied to a broker to get insurance, to prove the order and representations; (*Mackay v. Rhinelanders*, 1 Johns. Cas. 408,) or, though employed to make a purchase on terms which he exceeded, to testify between vendor and vendee. *Bailey & Bogert v. Ogden*, 3 Johns. Rep. 399.

18. When the interest in the subject matter of the suit is such that the verdict cannot be used in favor of the witness; as that of a widow, in an action for the recovery of lands claimed under her husband, out of which she is entitled to dower; (*Jackson v. Van Dusen*, 5 Johns. Rep. 144,) or a defendant in a suit at law, to prove perjury in an answer to a bill filed by him against the plaintiff, for a discovery respecting the merits of the question between them; (*Rex v. Boston*, 4 East, 572,) so if the suit in which the per-

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is not bound to look to the application, or inquire whether funds be in the master's hands. Mol. b. 2, c. 1, s. 10; Marsh. 639; Abbott, 121. This would be to ask a stranger to doubt the very man the owner himself has trusted. He holds him up to the world as trustworthy, and cannot say the reverse. The same principle exists in cases of executors. A man purchasing of them is not bound to see to the application. *Whale v. Booth*, 4 D. & E. 625, n.(a) Though the bankrupt law transfers to the assignees of Yard the property delivered to the defendant, it is subject to the lien for the amount of the exporting duties and freight.

Boyd, in reply. If the master can thus bind his owners,

jury is alleged, has terminated in favor of the witness. *Rex v. De Fluvia*, Peake's Cas. 104; *Rex v. Broughton*, 2 Stra. 1229.

The same rule holds in equity, notwithstanding the decision in *Rex v. Monetone*, cited 4 East, 576, and *The King v. Eden*, 1 Esp. Rep. 98, in which the evidence went to permit a party to manufacture it for himself. Where, however, a statute exempts a person from penalty or punishment on convicting another, a witness testifying to that effect is competent, though the verdict gained on his testimony may be used by him in his own discharge. *Howard v. Shipley*, 4 East, 180.

It has been a subject of frequent discussion whether a person whose name has been forged to an instrument, is a competent witness to prove the forgery. In England he is held to be incompetent; (*The King v. Boston*, 4 East, 582, per Lord Ellenborough,) so in Connecticut, (*State v. Blodget*, 1 Root, 534; *State v. Bronson*, 1 Root. 307,) unless he comes within the principle of *Rex v. Broughton*, *ubi sup.*; as where the witness had recovered the money, on a receipt for which his name had been forged; (*Wells's Case*, Bull. N. P. 289,) or has been released by the party to whom liable by the forgery, (*Dr. Dodd's Case*, 2 Leach's Hawk. c. 46, s. 24, n.) whether it would be so with us is doubtful, (*The People v. Howell*, 4 Johns. Rep. 296,) he is not in Pennsylvania: (*Respublica v. Keating*, 1 Dall. 110; *Pennsylvania v. Farrel*, Addis. 246,) nor in Massachusetts. *Commonwealth v. Hutchison*, 1 Mass. T. R. 7.

A further rule on the subject of competency is, that an interested person is the best possible witness against himself. *Jackson v. Vredenberg*, 1 Johns. Rep. 159. Therefore, an uncertificated bankrupt to decrease his estate. *Butler v. Cooke*, Cowp. 70. A witness to prove himself liable. See *post*, p. 84, n. (a.)

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the whole of every shipowner's property will be at the mercy of his captain, and the consequence must be ruinous to commerce.

THOMPSON, J. The two questions arising out of this case, and made on the part of the defendant, are, 1. Whether James Hussey, was a competent witness; 2. Whether the defendant is bound by the contract Hussey made with the plaintiff, and to what extent.

I think the master of the vessel was a competent witness. His testimony would tend equally to charge himself on any event: and although, perhaps, he might himself have objected against being examined, yet, as his interest between these parties is equal, the objection against him could, with propriety, be made by neither. The witness was liable to the plaintiff on his bill of exchange which he had drawn on the defendant, which had not been accepted: and, if he had borrowed the money from the plaintiff in capacity of master of the vessel of which the defendant was owner, and had misapplied that money, he would be responsible to the defendant for such misapplication. He was therefore competent, not on the ground of necessity, *but because, as between these parties, he [*81] stood perfectly indifferent on the score of interest, which must exclude every presumption of bias on his mind. With respect to the second question, there is no doubt but the master of a vessel may make his owners personally responsible for necessary expenditures, relating to the usual employment of the vessel. The master is held up to the world as the agent of the owners. His character and situation furnish presumptive evidence of authority from the owners to act for them in such cases. But in order to make the owners responsible, it is necessary the supplies furnished the master should be reasonably fit and proper for the occasion; Abbott, 103; or that the money advanced to him for the purchase of them, should at the time, appear to be wanting for that purpose; the contrary would fur-

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nish a strong presumption of fraud and collusion on the part of the creditor. The court, however, I think, ought not to be scrupulously nice in requiring the creditor to show this necessity, to the full extent of the money advanced. The master is elected and appointed by the owners, and by their appointment of him to a place of trust and confidence, (1 Bro. Parl. Cas. 284,) they hold him forth to the public as a person worthy of such trust and confidence. The existence and extent of such necessity were proper questions for the determination of a jury. The master swears that the money borrowed was for the purpose of paying the necessary expenses of the ship, and the exporting duties of the cargo, the whole of which has been delivered to the defendant, together with a full account of all the transactions. So that if all the money borrowed was not expended for the purposes for which it was loaned, it has been accounted for by the master. There can be no doubt, I think, that the captain had a right to borrow money on the credit of his owner, to pay the *necessary expenses of the ship*, and the money applied to the payment of the exporting duties was clearly for the benefit of the defendant; he was interested in the outward cargo, and it is fairly to be presumed he was also in the return cargo. At any rate the whole of the cargo, upon which the exporting duties were paid, has been delivered to the defendant, and upon which he will have a lien for the repayment of the money against any claim on the part of the assignees of Yard.

[*82] *There appears some contradiction between the master and mate as to the extent of the necessity of the expenditures; their credibility was, however, a proper subject for the jury, with whose decision I see no reasonable ground for dissatisfaction. I am therefore of opinion that the plaintiff ought to have judgment.

KENT, J. It will not be requisite for me to examine the first question, because, admitting Captain Hussey to have been a competent witness, I am of opinion the plaintiff is

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not entitled to recover. There was no special authority given to the captain to bind the owner of the vessel. All the power that he had was derived from his general and ordinary character as master; and in that character, he can only bind the owner of the ship to contracts relative to the usual employment of the ship, and the means requisite for that employment. Abbott, 88, 92, 94, 97; Abbott, 102; 1 Bro. Parl. Cas. 284. This power relates only to the *carriage of goods*, and the *supplies* requisite for the ship. The master *quoad* the cargo is limited to the duties and authorities of safe custody and conveyance, and, except in cases of unforeseen necessity, he is a stranger to the cargo beyond those purposes. 3 Rob. Adm. Rep. 257, 258. The contract, in the present case, was not respecting the employment of the ship. It was wholly distinct from it. The payment of the export duties at Port Republican was made by the master, in the assumed character of *agent respecting the cargo*, and whether well or ill assumed, is perfectly immaterial as it concerns the owner of the ship. He can only be affected by contracts relative to the master's trust, who is set over the ship, and not over the cargo; and the owner of the ship cannot be bound by any contract of the master concerning the purchase of goods, or the charges attending them. If this had been a contract concerning the destination of the vessel from Port Republican, the time of sailing, or the amount or species of goods she was to carry; or if it related to the repairs of the ship, or the stores and provisions requisite for the voyage, the question would have been very different. But it would be of most dangerous consequence to shipowners, to be held responsible for all the master's contracts and loans, relative to the goods on board; and it would be unjust on principle, because such contracts are not within the purview of the master's trust. It is very clear, in *this case, that [*88] the loan of the plaintiff was not requisite for the ship's expenses: the master had funds in hand more than sufficient for all such purposes. The loan was for the pay-

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ment of the export duties on the sugar and logwood, and the sugar and logwood were purchased with the proceeds of the outward cargo belonging to Yard, and were delivered on board for and on behalf of Yard, and, consequently, the property vested in him, and went to his assignees. The delivery of the sugar and logwood to the defendant, on the ship's arrival at New York, cannot alter the nature and operation of the contract of loan; for the defendant must be responsible to the assignees of Yard for the amount of that cargo. It was formerly held, (*Johnson v. Shippen*, per Holt, Ch. J., 2 Ld. Raym. 982; Salk. 35;) that the master of a ship had no credit aboard, but upon the security of hypothecation; *that he could not bind the owners personally*, and that the hypothecation must have been for necessaries for the ship. But in the case of *Curey v. White*, Abbott, 102; 1 Bro. Parl. Cas. 234, it was established, after great litigation, in the house of lords, that the owners were liable for money borrowed by the master for necessaries for the ship, but it must appear that the money was wanted for the necessary use of the ship, and this, I apprehend, is the extent to which the owners liability has hitherto been carried. I do not think that the receipt of the cargo by the defendant makes any alteration in the case. The cargo did not belong to the plaintiff, and the acceptance of it cannot, I think, be construed into any affirmation of the loan, because there is no necessary connexion between the cargo and the loan, and the defendant had a right to receive and detain the cargo, as a security for the freight, and it was prudent for him to do so since Yard, to whom the cargo belonged, had already become a bankrupt. But there is another fact which completely does away this inference of any affirmation of the loan, and it is a fact direct and unequivocal; and this was the refusal to accept the bill of exchange. For these reasons I am for the defendant.

LIVINGSTON, J. Two questions are made by this case;

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1. Whether Hussey could be examined without a release from the plaintiff; and, 2d. Whether his contract was binding on the defendant. Unless masters be admitted as witnesses in cases of this kind it will be extremely difficult to ascertain whether such a necessity existed as would justify their *taking up moneys on their [*84] owners' account. I will not, however, say, that from necessity this testimony ought to have been received; because, as the witness had no interest, I see no reason why he should have been excluded. In any event, he stood indifferent between these parties, being liable either to pay the money received to the plaintiff, or to refund it in another action to the defendant. Thus in 7 D. & E. 481, *in notis*, it appears, that a master who had, as in this case, drawn a bill on his owners, was a witness between the bill-holder and his owners, he being liable, in Lord Kenyon's opinion to the plaintiffs on his bill of exchange, and to the owners if the money was borrowed improperly, or for himself. As to the damages for which Hussey may be liable on this bill, it does not appear that any are due; and if that be the case, I am not certain that the defendant, if he wrongfully suffered the bill to be protested, is not liable for them. If not, what is to prevent an action on the bill against Hussey, in which he would be entitled to a credit only for the sum recovered in this suit. I think, therefore, he was a competent witness. As to the second point, it is not easy to conceive a case of stronger necessity for making the loan than is here presented. It was the only way of securing the freight, and most manifestly for the owner's benefit. Yard being a bankrupt made no difference; for his assignee could not get at this property without discharging the freight, and the moneys paid for exportation duties. This lien existed against all the world. It is true, the cases generally speak of moneys borrowed for repairs and necessities, but the same reasoning applies here. This was money borrowed for the benefit of the owners, and in relation to the voyage then pursuing, and the whole transac-

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tion being in good faith, it would be hard to say the master shall refund it himself. But without deciding this point, it appears that the cargo brought back was received by the defendant, who, it is probable was immediately informed of what his captain had done. He must, therefore, for aught that appears to the contrary, have in his hands the very money for which this action is brought, and, at any rate, the acceptance of the cargo, under these circumstances, must be regarded as an affirmation of the captain's conduct. The plaintiff is, in my opinion, entitled to judgment.(a)[1]

New trial refused.

(a) Wherever a witness is, in all events, liable to one or other of the parties to a suit, and his testimony goes only to determine to which he shall be so liable, he is competent. Therefore, in an action by the holder of a bill against the drawer, the acceptor is a good witness to prove he had no funds of the drawer's in his hands at the time the bill was drawn. *Staples v. Okines*, 1 Esp. Rep. 322. So a payee of a bill of exchange, drawn without consideration, is competent, in an action by his endorsee against the maker, to prove the time of his endorsement, and the value given for it; because he is liable to the drawer for money paid, if the verdict be against him, and if it be for him, to the endorsee on the endorsement. *Shuttleworth v. Stevens*, 1 Camp. 407. But where the payee of such a note is discharged under an insolvent or bankrupt law, posterior to its date, he is not a competent witness for the defendant maker, because he is not liable to the plaintiff endorsee, and would be to the defendant if a verdict went against him. *Maundrell v. Kennett*, *ibid.* 408, n. So an endorser of a bill who has received money from the drawer to take it up, may prove the payment of the bill in an action by the endorsee against the maker; for he is liable, on his endorsement, to one party, and to the other for money had and received; the extra liability to the costs of the action in which he testifies is of no importance. *Birt et al. v. Kershaw*, 2 East, 458; *Iderton v. Atkinson*, 7 D. & E. 480, overruling, in this respect, *Buckland v. Tankard*, 5 D. & E. 678; see *Renaudet v. Crocken*, 1 Caines' Rep. 168, and *M'Leod v. Johnson*, 4 Johns. Rep. 126.

[1] See New York Digest, title Witness. The competency of witnesses, &c., and the rules heretofore existing as to witnesses, have been materially altered. Under the Code of Procedure, a party to the action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and may be compelled to testify, &c. See Code of Procedure, p. 163, § 390; [sec. 344,] see *Bank of Charleston v. Emerick & Davenue*, 2 Sandf. 718; *Park v. Mayor, &c., of the City of New York*, 3 Com. 489; *Pillow v. Bushnell and others*, 4 Howard, 9; *Brockway v. Stanton*, 2

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Sandf. 640; *Anderson v. Johnson*, 1 Sandf. 713; 2 Code Rep. 66; 2 Code Rep. 75; 2 Sandf. 667; and for certain purposes a party may offer himself as a witness. See *Myers v. McCarthy*, 2 Sandf. 399, 2 Code Rep. 143; see examination of co-plaintiff or co-defendant, Code of 1849, and amendments thereto passed 1851; Code of Procedure, § 397, p. 155. For authorities on the above, see 4 How. 272; 5 How. 223; 5 How. 296; 5 How. 401, and 5 How. 281. Code of Procedure, p. 156, says, No witness to be excluded by reason of interest, § 398; [sec. 351,] and also shows to whom this rule does not apply in § 399, [sec. 352.] For decisions under Code of 1848 and 1849, see 7 Barb. 157, S. C. 3 How. 401, S. C. 1 Code Rep. 108, 2 Code Rep. 16, 5 How. 8, also see 6 Barb. 566. By sections (of Code) 64, sub. 15, this applies also to justices's courts. See also different decisions and opinions as to competency and incompetency, *Pillow v. Bushnell*, 2 C. R. 19, 4 Pr. Rep. 9, 1 C. R. 133, 7 L. O. 225, 1 Code Rep. 123; *Hffman v. Stephens*, 2 C. R. 16, 1 C. R. 113; *Farmers Bank v. Paddock*, 1 O. R. 81, 3 How. 401, 1 C. R. 108, 7 L. O. 139 2 C. R. 33.

END OF MAY TERM.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN AUGUST TERM, IN THE TWENTY-FIFTH YEAR OF OUR INDEPENDENCE.

**J. and G. DEPEYSTER *against* THE COLUMBIAN INSURANCE
COMPANY.**

If a plaintiff examine his witness and deliver him over to the defendant to cross-examine, and before any opportunity offer to enable the plaintiff to ask him any questions in explanation, the witness fall down in a fit, and the plaintiff go on to examine other witnesses, and try the cause, the court will not afterwards grant a new trial to give the plaintiff an opportunity of letting in the further testimony of the same witness. If the defects in a vessel existing previous to the effecting a policy of insurance, be not such as to render the vessel unseaworthy, though she may demand repairs on her voyage, if she perish in its prosecution, the amount of the repairs required for her anterior defects are not to be deducted from that of the verdict, if rendered for a total loss. If a judge misdirect in one point, which does not go to the merits of the case, according to which the jury decide, the court will not, on that account, order a new trial.

THIS was an action to recover a total loss by perils of the sea, on a policy of insurance on goods on board the schooner John, for a voyage from New York to Curacao.

From the testimony of the mate and master, who was

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also owner of the vessel in question, it appeared that the circumstances of the case were these :

The bottom of the John was, at the time of her sailing, a little worm-eaten ; but she was, notwithstanding, a staunch, tight, and strong vessel, completely found, manned and equipped for the voyage. On arriving a little to windward of her place of destination, the captain perceived the day too far spent to admit of running into his port before dark, and therefore lay too, lest he should pass it in the night. Notwithstanding this precaution, on looking out, at daybreak, he found himself considerably to leeward of Curracoa. In order, however, to gain his port, he continued ineffectually endeavoring to beat to windward, till his wood and water were nearly exhausted ; when, the [*86] *vessel being so leaky, from bad weather which she had encountered, as to require one pump to be always kept a going, and sometimes both ; being also shattered and damaged in her rigging and sails ; it was, on consultation with the officers and crew, determined to bear away for Kingston, in Jamaica, where they in a few days arrived, with the cargo uninjured. The state of the vessel requiring repairs, she was surveyed, not in a regular manner under a warrant from the court of admiralty, but at the request of the master, by some seafaring captains, who pronounced, as the witnesses deposed, that she could not be repaired for her worth at the time of her sailing from New York. On this, and after a fruitless attempt to procure a vessel to carry on the cargo to Curracoa, the captain broke up the voyage and sold the cargo, part of which consisted of perishable articles, for the benefit of whom it might concern, at a loss however, of nearly 50 per cent. So impossible was it to procure a conveyance from Kingston to the port of original destination, that a passenger, who went out in the John, was obliged to return to New York, and again embark from thence to Curracoa. Having in some degree refitted the vessel, she sailed in ballast for Savannah ; but on her passage (as out of her crew,

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composed of only five persons and a boy, two had died) she put into the Havanna, where she was hove down, repaired and refitted, and a cargo of one hundred and fifty boxes of sugar taken in, with which she arrived safely in the United States. When at the Havanna, she was examined, and her bottom found very much injured by worms, but as the expense of repairing was much less at the Havanna than at Kingston, they were bestowed at the former place, without doing of which the schooner could not have proceeded. On the trial, the master, while on his cross-examination by the defendant, was seized with a fit, and could no further testify; but neither party desired the trial to be put off on that account.

The judge charged, that if the jury believed the vessel to be seaworthy when she sailed, and that the expense of repairing her when at Kingston would have cost half her value, they ought to find for the plaintiffs for a total loss, but in calculating the repairs, if they were of opinion any were necessary on account of injuries received by means of worms before the vessel sailed, *the re- [87] pairs for such injuries ought not to be calculated to the prejudice of the defendants, but that they should confine their estimate to the damages subsequently sustained during the voyage.

On this a verdict was given for the defendants, to set aside which the court was now applied to.

Jones, for the plaintiffs. The circumstance of the captain's being seized with a fit prevented our re-examination, as to points which the defendant's cross-examination rendered necessary. The sale of the cargo was unavoidable, as it was impossible to convey it to the port of destination; and as the amount of the repairs at Kingston was more than half the value of the vessel, it constituted a loss of the voyage, on which the assured had a right to abandon, as it arose from perils of the sea. Wherever a vessel is, from

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perils of the sea, unable to reach the port to which bound, the owner of goods insured may abandon, unless it appear that the ship was not seaworthy at the time of her sailing. This she is, notwithstanding any little defects, if, in her then state, adequate to the voyage. Should she in the course of performing it demand repairs, the *quantum* induced by such anterior defects, are not to be deducted from the amount, in order to prevent the conclusion of a loss of voyage; because it is, in the first place, impossible to discriminate between the value of the repairs for the injuries prior to her sailing, and those which arise subsequently. In the next place, the underwriter is always compensated to the supposed extent of such previous injuries, in the deduction which is constantly made of one third new for old. This allowance is made him as a kind of premium for his responsibility for subsequent accidents, inducing a deterioration to more than half the worth of the vessel. In the estimation the judge charged the jury to make, there was, therefore, an evident misdirection, and this is sufficient to induce an order for a new trial.

Bogert, contra. The application cannot be granted to let in the evidence of the captain. His testimony was inadmissible; for, as he was owner, he was interested in proving the sea worthiness of his vessel at the commencement of the voyage, and her becoming so from perils of the sea, to prevent an action against himself by the owner [*88] of the goods. *To render him competent he ought to be released. *Peake's Law of Ev.* 113, citing *Rotheroe v. Elton*, and *Fox v. Lushington*, *Peake's N. P. Cas.* 84. But if competent the plaintiffs had finished their examination, and a new trial is never awarded to let in evidence, merely because the party sees where the cause presses. 2 Bl. Rep. 813.(a) On the point of unseaworthiness, nothing

(a) *Spong v. Hogg*. In this case the counsel had, from prudential motives, omitted to produce the testimony wanted to be introduced on the second trial.

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is more settled, than that, if induced by defects before the voyage is commenced, the underwriter is discharged. He is liable only for injuries during the voyage; and if those injuries be less than half the value of the vessel, there is no ground for breaking up the voyage.

Hamilton, in reply, Where testimony has been omitted by a party, in consequence of advice from his counsel, by which he was misled, the court will grant a new trial; *a fortiori* when the act of God prevented its being adduced. In *1 East* is a case to this. Where the defects are not such as to create unseaworthiness at the time when the policy attaches, they are not at the risk of the underwriter. *Miller*, 110, *et seq.* In *De Costa v. Newnham*, the discrimination in the charge was not even touched on, though old and new injuries were the subject of litigation.

LIVINGSTON, J. delivered the opinion of the court. A motion for a new trial is made on the following grounds: 1. Because the plaintiffs were deprived of the full benefit of the testimony of one of the witnesses, by reason of his sudden illness. This witness was not seized with a fit until the plaintiffs had examined and given him over to the defendants; but had it been otherwise, they should have suffered a nonsuit. Instead of this they proceed with the trial, examine other witnesses, and take the chance of a verdict on the testimony then in their power. After this they come too late for a new trial.(b) 2. It is alleged that the verdict is against evidence. The extent of the injury sustained, and expense of repairing, were fairly submitted to the jury as questions of fact, and there is no room to say they have decided them contrary to the evidence. What the

(b) See *Halley v. Watson*, 1 Caines' Rep. 25, n. (a.) and *Steinbach v. Columbian Ins. Co.*, post, 123, n. (a.) and *Deas v. Smith*, 1 Caines' Rep. 174, n. (a.)

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repairs cost does not exactly appear; those at Kingston amounted to near four hundred dollars. After mending her sails, rigging and bowsprit, and calking her upper works at Kingston, the John sailed for Savannah, but having a [*89] dying and *sickly crew, and the schooner continuing leaky, she was obliged to put into the Havanna. There she received a new bowsprit, topsail, squaresail, and flying-jib; she was also hove down, calked and graved, but not sheathed; her bottom was somewhat worm-eaten, and the captain believes that was in some degree the case when she left New-York: after these repairs she took in a cargo of 155 boxes of sugars and returned to Philadelphia. From this statement it is impossible to say that satisfactory evidence was offered to the jury, that her repairs would cost a sum sufficient to justify breaking up the voyage. The mate swears as to this point only from hearsay, and the captain, who was very much interested in making a good story, only gives his opinion, without producing any survey. The repairs actually put on her, the good condition of her cargo, and her returning to the United States with a heavy lading, are strong circumstances against the plaintiff's claim. 3. It is also said the jury were misdirected on a point of law. In calculating the cost of repairs, they were told that if they believed any were necessary on account of injuries received from worms prior to the vessel's sailing, the expense of such repairs should not be included in the estimate. This direction is supposed to be incorrect, inasmuch as it prescribes a rule difficult if not impracticable to follow. How, it is asked, are the jury to distinguish between repairs rendered necessary by perils of the sea, and those which are become so in consequence of some damage or defect existing at the commencement of a voyage? And from this difficulty of making the proper separation, as well as from the nature of the contract, it is insisted that the true rule is the one laid down by Millar, 186, in his Treatise on Insurance, which is, "that underwriters are responsible

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for pre-existing defects, unless they be so great as to render the vessel not seaworthy." It may at first seem hard to hold an insurer in any way liable for the defective nature of the thing insured, but so long as the subject of insurance be seaworthy, is it not part of his contract that in case of accident, he will defray all the expense of placing her in *statu quo*? If she be totally lost, he pays the whole sum subscribed without any inquiry into her condition, any father *than to ascertain whether she were sea- [*90] worthy; so if she be partially injured, the repairs being rendered necessary by a peril insured against, they ought to be made, without any other examination as to her antecedent state, except to determine the same fact of her being seaworthy; for, unless she had been further damaged by one of the perils insured against, no repairs at all would have been necessary. This point is not settled by any adjudged case. In *Manning v. Newnham*, reported by Millar, 808, the defendant proved some of the damages old and some recent. This is all that is said, and the defendants' counsel lay no stress on part of the damages being ancient, nor does Lord Mansfield take any notice of that fact. This case, therefore, proves nothing either way. I adopt, however, as a general rule that if the old injuries are not such as to render the vessel innavigable, no deduction, in case of accident, is to be made on that account from the cost of repair, and therefore think the judge was mistaken in directing the jury to make the distinction he did. But admitting a mistake in the judge's charge, a new trial ought not always to be the necessary consequence; it is not for every misdirection in point of law that the parties should be put to the expense of further litigation. If the result from the testimony would probably have been the same, whether a particular direction had been given or not, it can be no reason for granting a new trial. Here if the jury had taken into the the estimate the expense of all repairs, without any deduction for old or former injuries, their verdict must have been the same. If, then, there be

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be good reason to think the plaintiffs have not been injured by the judge's mistake, they ought not to be indulged with a new trial. I do not, by any thing that has been said, mean to be understood as subscribing to the *nisi prius* opinion of Lord Kenyon, which was cited from 1 Esp. Rep. 444, "that if a ship's bottom during a voyage be eaten by worms, so that she be incapable of proceeding, and be condemned, this is not a loss within the policy." It is not necessary to decide this question now.

New trial refused.

[*91]

*GREEN against LONG.

In an action for saying of another "he is perjured," it is enough to prove the words spoken, and that they refer to the plaintiff. If it appear they were spoken in giving testimony in an inferior or particular court, the competence of that court to administer an oath need not be proved, but its incompetency must appear from the defendant.

THIS was an action of slander for saying of the plaintiff "you have perjured yourself." The plea not guilty, with a notice subjoined that it would be proved on the trial, that the plaintiff was examined as a witness before a court-martial, held, agreeably to law, upon the defendant, as a captain, for disobedience of orders. The notice then set forth to what the plaintiff testified, that it was material to the charge in issue, and was not the truth. The cause came on before Mr. Justice Kent, at the Washington circuit, in 1808. The plaintiff at the trial proved the words spoken, and to be understood as referring to him; but the defendant urging, that in addition to this testimony, the proceedings of the court-martial ought to have been produced to evince its existence, and competence to administer

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an oath, the judge allowed the objection, and nonsuited the plaintiff.

The application now made was to set aside this nonsuit, and order a new trial.

Russel, for the plaintiff. We shall submit to the court whether, in an action for words actionable in themselves, the plaintiff is bound to prove more than the speaking those words? Secondly, whether, in case he is, as the notice in the present instance acknowledges the existence of the court, and proceedings therein, the defendant is not precluded from taking the objection he has raised?

Van Vechten, contra. On the first point it is necessary only to inquire whether actionable words may not be explained by others uttered at the same time, or by circumstances tending to show that, though in themselves actionable, their actionable quality was done away. Suppose it had been said the plaintiff was perjured in a court which does not exist? It surely might be shown that there was no such court, and therefore no perjury could have been committed. As to the second point, the notice is merely provisional, to be availed of if the person chooses. The plaintiff must always prove his case, in the same manner as if a notice was not annexed.

Woodworth, in reply, was stopped by

KENT, Ch. J. I am clear I was wrong at *nisi prius*. It ought to have been intended and presumed, that everything took place before a court of competent jurisdiction. The *onus* lay on the defendant to show that it was otherwise. As to the argument that there might not have been any such court as that in which the perjury was alleged to have been committed, it would, in my opinion, have been an aggravation of the offence. The assertion might have had all the effects of a charge of

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perjury before a competent jurisdiction. I am therefore for granting a new trial, with costs to abide the event of the suit.(a)

New trial granted.

JACKSON against MANN.

Where a party has it in his power to enforce payment of costs awarded him by attachment, the court will not take the non-payment into consideration, in forming a subsequent decision on a collateral matter. An attachment in the first instance is not granted against a witness for disobeying a *subpoena*. The practice is, to move for a rule to show cause. Absence of a plaintiff's witness at the trial, after a due *subpoena*, is good cause against judgment as in case of nonsuit, and excuses stipulating.

HENRY moved for judgment as in case of nonsuit for not proceeding to trial, and also for costs of the last circuit, and those formerly, ordered, on an affidavit, stating a similar motion in a former term, in which the expense of witnesses only was allowed, as the cause had been countermanded by consent; that these costs had been demanded and not paid, after which the cause was again noticed, but neither plaintiff nor his witnesses attending at the circuit, the defendant requested that he and his witnesses might be discharged, which, however, the plaintiff's attorney absolutely refused.

Van Yeveren, contra, read an affidavit, setting forth that the plaintiff had duly *subpoenaed* one Obadiah Phelps, his principal witness, but that he did not attend, and was, as the deponent verily believed, kept away by the contrivances of the defendant. He insisted also, that as notice of trial for the last circuit was accepted, the defendant had waived his right to the former costs. If the court should be

(a) See *Hopkins v. Beadle*, 1 Caines' Rep. 343, n. (a.)

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against him on these points, he hoped they would grant an attachment against Phelps, whose contempt in disobeying the *subpœna* was the cause of not proceeding to trial.

Per Curiam. The absence of the plaintiff's witness is sufficient to induce us to refuse the application for a nonsuit, and even to excuse him from stipulating; but as he is in contempt for not paying the costs formerly ordered, let him pay those of the last circuit within twenty days after due demand; in default thereof, the defendant to be at liberty to enter up judgment as in case of nonsuit

*As to those costs, which, on the former occasion, [*93] were allowed, we do not take them into consideration the defendant having it in his power to enforce them by attachment; and, with respect to the attachment prayed for by the plaintiff, it is not usual to grant one in the first instance, unless some wilful disobedience to the authority of the court is made to appear; the plaintiff, therefore, can have only a rule to show cause.

Motion denied.

JACKSON, on the demise of VAN BERGEN and others,
against HAIGHT.

If a plaintiff be prevented from proceeding to trial for want of papers, which he had an honest fair cause to expect, it will be sufficient to prevent an application for judgment as in case of nonsuit, but not to excuse the costs of the circuit.

SCOTT, on an affidavit stating that this cause had been duly noticed for the three last circuits, and that younger issues had been tried, moved for judgment as in case of nonsuit for not proceeding to trial at the last circuit in Green, pursuant to notice.

 Jackson v. Weed.

Champlin resisted the application, on a deposition setting forth that the papers necessary for the defence had been left with him for eight months previous to the circuit, to use at the trial; but that they had been, two weeks before it was to have been held, taken from him by the person from whom he had received them, under a promise to return them before the time the cause would come on. That the title depended on the Catskill patent; from the great length of the documents, and exemplifications in which, the expense of copies was so great as to render the saving it an object of importance. That in all other respects the defendant was ready for trial, and now relied on these circumstances being received as a sufficient excuse.

Scott, in reply, urged that the benefit of the papers might have been had by a *subpoena duces tecum*.

Per Curiam. We think the excuse sufficient to prevent a nonsuit, but not to relieve from costs; let, therefore, the defendant take nothing by his motion, on the plaintiff's paying costs for not bringing the cause to trial at the last circuit.

Motion refused on payment of costs of the circuit.

[*94] *JACKSON, *ex dem.* SALISBURY, against WEED.

If it appear the court would not have tried a cause at the circuit had the plaintiff been ready, judgment as in case of nonsuit will not be granted, and costs will be allowed only for the witnesses, up to the time when the determination of the circuit judge was made known.

SCOTT moved for judgment as in case of nonsuit for not proceeding to trial in the county of Ulster, according to

Jackson v. Webb.

notice, in this and several other causes depending on the Catskill patent.

It appeared that at the close of the circuit, the judge gave it to be understood he should try none of those suits, a case having been made, and the decision then pending in another cause resting on the same title, but this intimation was not given till towards the end of the circuit, and no attempt was made to bring on the causes on the first day according to notice.

Per Curiam. This case is to be distinguished from the preceding, in which the plaintiff acknowledges he was ready for trial in all respects but the want of his papers. It was therefore in some degree his own *laches* in not procuring them, nor countermanding his notice, and the cause was at issue in another county from that in which the above intimation was given. But *here*, had the parties been willing, the court would not have proceeded. Costs, therefore, for the attendance of witnesses on the first day is all that we shall order.

Motion denied.

N. B.—The court seemed to incline that if a number of issues depend on the same title, and a case is made in one, the plaintiffs need not continue to notice for trial, circuit after circuit. If, however, they should do so, though the non-decision of the cause in which the case was made might excuse judgment as in case of nonsuit for not proceeding to try, pursuant to notice, it would not exonerate from costs.

Chandler v. Trayard.—Jackson v. Gardner.

CHANDLER and WIFE *against* TRAYARD.

An application for a new trial on account of newly discovered evidence is an enumerated motion.

SCOTT endeavored to bring on, as a non-enumerated motion, an application for a new trial in this cause, on an affidavit of newly discovered evidence.

Per Curiam. It is clearly an enumerated motion, and cannot be heard this day.

[*95] *JACKSON, *ex dem.*, NORTON and others, *against* GARDNER.

An affidavit of service, stating it to be by leaving notice and copy on the table of the opposite attorney, is not good, unless it also set forth that there was not any one in the office.

VAN VECHTEN moved, on the common affidavit, for judgment as in case of nonsuit for not proceeding to trial, but the affidavit of service stated only that it was made by leaving copies on the table of the attorney's office, about one o'clock in the afternoon.

Per Curiam. The affidavit is defective; it does not set forth that there was no one in the office. The notice might have been slipped down without any intimation, and have remained there unobserved. To make such a service good, it ought to have been stated there was not any one in the office. The defendant can take nothing by his motion.

Motion denied.

Bain v. Thomas.

BAIN against THOMAS and GREEN.

No agreement between attorneys can be noticed unless reduced to writing.
See 1 Caines' Rep. 148, n. (a.)

RUSSEL moved for judgment as in case of nonsuit.

Blanchard resisted the application on an affidavit stating a conversation, which he considered as an agreement to waive the irregularity.

Russel wished not to rely on the rule respecting written agreements, could the conversation be substantiated.

Per Curiam. The court cannot take notice of agreements between attorneys, unless reduced to writing. If it is intended to waive the rule on this subject, the motion must be withdrawn; otherwise judgment of nonsuit must be entered, unless the plaintiff stipulate and pay costs.[1]

Motion granted *nisi*.

[1] *Parker v. Root*, 7 J. R. 320; *Combs v. Wyckoff*, 1 Cal. R. 147; *Shadwick v. Phillips*, 3 Cal. R. 129; *Dubois v. Roosa*, 3 J. R. 135; *Brandt an dem. Palmer v. Borrian*, 3 Cal. R. 131; *Griswold v. Lawrence*, 1 J. R. 507; *Browns v. Wellington*, 1 Sandf. R. 664.

Palmer v. Mulligan.

PALMER, SCHUYLER and NELSON *against* MULLIGAN, H.
and N. MOODY and GATES.

If two causes turn on the same point, and a verdict be given in one on which a case is made, it is enough to prevent judgment as in case of nonsuit for not proceeding to trial in the other, or a stipulation, but will not excuse costs.

VAN ANTWERP, on the common affidavit, moved for judgment as in case of nonsuit for not proceeding to trial.

Woodworth, contra, stated, that this was one of two causes depending on the same point. That in the other, the verdict had been given against the plaintiffs, contrary to the opinion and charge of the judge before whom the cause had been tried, for which reason the present [*96] suit had not *been brought on, and a case was made in that which had been heard, and was now before the court.

Van Antwerp, in reply. A case ought to have been made in the other cause; as it has not been done, it is a waiver of any intention to rest on the point in the other; the plaintiffs must, therefore, pay costs and stipulate, or we must have our judgment.

Per Curiam. You are entitled to costs, but as there is a sufficient reason for not proceeding to trial, we shall not oblige the plaintiffs to stipulate.

SPENCER, J. I think they ought to stipulate. There is a verdict in favor of the defendants, which, till the contrary is shown, we ought to think correctly given.

Motion denied.

 Bradt v. Way.—Stocking v. Driggs.

BRADT against WAY and WIFE.

If a cause be submitted to arbitrators before a circuit, and an application afterwards made for judgment as in case of nonsuit for not proceeding to trial, the plaintiff will be entitled to costs for resisting the application.

VAN ANFWEAP moved for judgment as in case of nonsuit for not proceeding to trial according to notice.

Van Yeveren read an affidavit stating, that previous to the circuit, arbitration bonds had been entered into by the parties in the suit, and an award made.

Per Curiam. Let the defendant take nothing by his motion, and pay the costs of resisting this application.

Motion denied with costs.

N. B. It seems that whenever the affidavits contra disclosed circumstances that clearly show the application noticed will be ineffectual, costs for resisting will follow the denial.

STOCKING against DRIGGS.

If issue be joined before a justice, a trial had, and the judgment be rendered, it ought to specify it to have been on "hearing the proofs and allegations," or it will be bad on error brought.

ERROR on a *certiorari* upon a judgment in a justice's court.

From the return it appeared that the action below was brought against the now plaintiff, as the maker of a promissory note for 20 dollars; that after a plea of *non assumpsit*, the defendant below prayed an adjournment, which be-

 Stocking v. Driggs.

ing granted, the plaintiff Driggs appeared on the day given. The record then went on thus: "And the defendant not appearing, although solemnly called, I the said justice proceeded on the producing the said note by the said [*97] plaintiff, and *gave judgment for the plaintiff on said note, for the sum of, &c.

Williams, for the plaintiff. The return shows that the justice proceeded without examining any witnesses. This judgment is founded on the simple production of the note. This, in no court, is sufficient to entitle a plaintiff to recover, still less in that of a justice.

W. Van Ness, contra. As the note was produced it must be intended it was proved.

Per Curiam. The judgment ought to have been "on hearing the proofs and allegations" of the parties. 1 Rev. Laws, 497. The judgment must, therefore, be reversed, for it was error in the justice to give judgment till he had proof of the note.[1]

Judgment reversed.

[1] In a justices' court the plaintiff must prove his case before he is entitled to judgment, even although the defendant makes no defence; nor can a plaintiff enter judgment on default of the defendant. *Muscott v. Miller*, 1 Code Rep. 123; *Smith v. Falconer*, 1 Code R. 120. Contra: see *Everett v. Lish*, 1 Code R. 71. As to justices' power of entering judgment, see art. 8, tit. 4, ch. 2, part 3, Rev. Statutes; see Code 1851, § 53, [sec. 46.] p. 22; art. 8; *Bromaghin v. Thorp*, 15 J. R. 476; *Martin v. Moss*, 6 J. R. 126; *Gale v. Chace*, 3 J. R. 147; *Hubbard v. Spencer*, 15 J. R. 244.

 Columbia Turnpike v. Woodworth.

THE PEOPLE *against* THE JUDGES OF THE COURT OF COMMON PLEAS in and for the County of Washington.

The affidavit for an attachment against judges of an inferior court for disobeying a *mandamus* ordering them to seal a bill of exceptions, ought to show that the persons served are those who ought to sign.

EMOTT moved for an attachment against the defendants for not obeying a peremptory *mandamus*, commanding them to sign a bill of exceptions. See vol. 1, p. 511. The affidavit did not state the service to have been when the court was sitting, or the persons on whom made.

Champlin, for these reasons, objected to the application.

KENT, Ch. J. It ought to appear that the persons who were served, were those who ought to have sealed the bill. Nothing can be taken by the motion.

Motion denied.

THE PRESIDENT and DIRECTORS OF THE COLUMBIA TURNPIKE *against* WOODWORTH.

A person merely riding through a gate of the Columbia turnpike, is not liable to the penalty of the ninth section, unless it be accompanied with force and violence.

THIS was an action brought for the penalty, under the ninth section of the act incorporating the Columbia turnpike road, for simply riding through a gate without paying toll, without any force or violence. The question was, whether the action was maintainable.

Per Curiam. The act had in contemplation only forci-

[1] See present practice as considered in 3 Howard's Rep. 379.

Mann v. Marsh.

because the term under which the defendant claimed had expired.

KENT, Ch. J. The inquisition and proceedings below must be quashed, and re-restitution be awarded. The last objection is fatal, within the decisions of this court, in *Beebe* ads. *The People*, in January term, 1802, and *Shaw* ads. *The People*, August, 1808. Vol. 1. p. 125. I think the second and fifth also are equally fatal. As to the objection that the term is expired, and neither party have title, we cannot inquire into, and decide by affidavit in this way on the title or rights of the parties: the complainant below has nothing to do with that. He must give up the possession irregularly obtained, put the defendant in *statu quo*, and then proceed legally to the question of title.[1]

Conviction quashed.

Re-restitution awarded.

MANN against MARSH.

If a debtor do not direct the application of a payment, his creditor may place it to what account he pleases.

THE court ruled that where a person pays money to a creditor, who has demands against him on two accounts, the creditor may place it to which he pleases, unless the debtor direct its application.[2]

[1] *People v. Shaw*, 1 Cal. R. 125; see Rev. Stat. vol. 2, p. 508, a 3, & 11; *People v. Van Nostrand*, 9 Wend. 52; see 4 Black. Com. 148; 1 Hawk. 274; 11 J. R. 504; 9 Wend. 51; 11 Wend. 157; 13 J. R. 349; 1 Hall, 240. As to complaint, &c., see 2 R. S. p. 508, § 3, and subsequent sections; 10 J. R. 304; 13 J. R. 158.

[2] See decisions relative to the application of money paid on account, *Clark v. Burdett*, 2 Hall, 197; *Hall v. Constant*, 2 Hall, 185; doctrine con-

Marscroft v. Butler.

MARSCROFT *against* BUTLER.

If a prisoner be not brought up for his discharge under the insolvent law till the last day of the term, and his creditor then oppose him on an affidavit of showing probable cause of impeaching the fairness of his inventory, the court will remand to the next term.

THE defendant had applied for his discharge, under the insolvent act, on the first Thursday in term, but no measures had been taken to bring him up till the last day. The plaintiff then moved for time to oppose, on an affidavit, stating that notice of the application had come to him only on the second day of the then August term. That one Benjamin Prescott, of Massachusetts, a material *witness to prove the falsity of the defendant's inventory, and that he expected to be able to obtain his testimony. [*100]

Per Curiam. The prisoner must be remanded till the first day of the next term. We do this with regret, but the act is too imperative to admit of discretion. As the defendant did not apply to be brought up at an earlier day, it is in some degree his own *laches*. Let him be brought up next term.

sidered and discussed in case of *Stone v. Seymour*, 15 Wend. 19; *Paterson v. Hale*, 9 Cow. 747; *Seymour v. Van Slyck*, in Error, 19 Wend. 19; 3 Sumn. R. 98; 9 Wheat. 720; *Allen v. Culver*, 3 Denio, 284; *Couperthwaits v. Sheffield*, 1 Sandf. Rep. 416; *Niagara Bank v. Roosevelt*, 9 Cow. 409; *Baker v. Stackpoole*, 9 Cow. 420; *Van Ransselaer Es. v. Roberts*, 5 Denio, 470; *Pattison v. Hull*, 9 Cow. 747; *People v. County of New York*, 5 Cow. 331; *Roberts v. Garnie*, 3 Cal. R. 14.

The People v. Barrett—M'Cabe v. M'Kay.

THE PEOPLE *against* BARRETT and WARD.

That a judge has, in a criminal case, ordered a juror to be withdrawn, is no cause for arresting the judgment on a subsequent trial for the same offence.

At the last circuit court, held at Salem, in the county of Washington, the defendants had been indicted, arraigned, and had pleaded not guilty. After this the District Attorney moved the court for leave to withdraw a juror, which was granted without the defendant's consent. On a subsequent day they were again brought up, on the same indictment, and found guilty.

Russell, on these facts, submitted whether the court can, after a prisoner has been arraigned and pleaded, order a juror to be withdrawn without his consent; and whether, if he be so withdrawn, the defendant cannot avail himself of that circumstance in arrest of judgment.

KENT, Ch. J. This point underwent a very full discussion in the case of *Olcott*; it was then determined that a judge's having ordered a juror to be withdrawn is no cause for arresting the judgment on a subsequent trial for the same offence.^(a)

M'CABE *against* M'KAY.

Frivolous demurrer. Enumerated motion. Practice.

It was ruled in this case, that an application for judgment on a frivolous demurrer, is an enumerated motion,

(a) See *post*, 304, S. C., and the decision here overruled.

Temper v. Wright.

and it was also, at another day, in this same suit determined, that if the notice of motion specify it will be grounded on the frivolousness of the demurrer, it will give the applicant a priority before other enumerated causes, and entitle him to his judgment on reading the affidavit of service, and of general notice for argument, if no opposition be made.[1]

*TREMPEL *against* WRIGHT, who is impleaded [*101]
with P. TURNER, administrator of E. TURNER,
deceased.

If an administrator, by his plea in this court, admit assets, on which there is a regular judgment entered, it will not be set aside, to let in a plea of a judgment confessed in the common pleas, after filing the plea in this; not even though the judgment taken on the assets admitted, be for a few cents more than in strictness appear to have been acknowledged.

ASSUMPSIT *against* administrators.

Slosson. moved to set aside the judgment obtained in this cause for irregularity, and that the defendants be let in to plead a judgment recovered in the common pleas.

The affidavit on which the application was founded, set forth, that on the 2d of November, 1802, a plea was filed in this cause, by the defendant Wright, stating a debt by specialty, for 14 dollars and 75 cents due from the intestate to one Cornelius Cole, with interest from the 14th June, 1800, remaining unsatisfied, and *plene administravit*, except as to 702 dollars and 80 cents, and the aforesaid debt: that on this plea the plaintiff, on or about the 1st of February, 1803, entered in the rule book of the clerk of this court, in Albany, the following rule: "The de-

[1] See 2 Cal. Rep. 56; *Lape v. Becker*, 1 Denio, 563.

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defendant, James Wright, having by his plea acknowledged assets unadministered in his hands, to the amount of *seven hundred and two dollars eighty-one cents*, ordered judgment therefor on motion of Mr. Gardinier, and also, on like motion, interlocutory judgment for the residue, and that a writ of inquiry issue." That after filing the plea aforesaid, to wit, on the 7th day of January, 1803, in January term of that year, a judgment for 157 dollars and 12 cents damages, and 15 dollars and 15 cents costs, was recovered against the deponent in the common pleas for the county of Ulster, in an action against him, as administrator aforesaid, on a simple contract debt due from his intestate, which judgment he did not know ought to have been pleaded to the above suit.

The judgment, he said, as it appears on the record, is taken for twenty-eight cents too much, as it ought to have been entered on the assets, confessed for no more than the residue of these assets, after deducting the amount of the specialty and interest. This being a manifest irregularity, the court will, in favor of administrators who cannot otherwise be remunerated, set aside the proceedings, for the purpose of letting them in to plead a judgment to which they will otherwise be liable *de bonis propriis*.

Gardinier, contra, made a preliminary objection [*102] to the affidavit *of service of notice; which stated it to have been on a clerk of his in his office; he insisted that the name of the clerk ought to have been stated, that he might have known whether it was his clerk or not.

Per Curiam. It is sworn that the service is on your clerk, which is fully sufficient.

Gardinier then read an affidavit, by which it appeared that the *capias* in this suit issued on the 15th June, 1802, and was returned, in the July term following, *capi corpus*,

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as to the defendant Wright. That the *capias* in the common pleas, though returnable in July, 1802, was not filed until the 10th of November following. That the declaration in this court was filed on or about the 8th of September, 1802, *that* in the common pleas not till the 26th of November, and that the judgment in the common pleas was by confession; that a writ of inquiry in the present cause had been duly executed; the damage assessed to 1,075 dollars, and a record of the judgment thereon duly signed and filed on the 23d of November last. From this, he argued, the presumption was, that the suit had been first commenced, though if otherwise, which it might have been, the defendant ought to have shown it. But after filing a plea on the 2d of November, admitting assets, he ought not to be permitted, on the 7th of January following, to suffer a judgment by confession, on a demand of no higher nature than that in which he had acknowledged assets. Independent of this, the application was too late. The twenty-eight cents were among the *minimis*, of which *non curat lex*. The judgment was regular for the assets confessed, and for the residue, *quando acciderint*.

Per Curiam. The proceedings on the part of the plaintiff have been perfectly regular, and therefore no cause shown for the interference of the court. The interlocutory judgment was necessary to liquidate his demand; it afterwards becomes peremptory for the sum confessed, and for assets *in futuro* as to the residue.

Motion denied.

Gross v. Hobson.

GROSS, JUN. *against* HOBSON.

If a defendant do not plead his discharge under the insolvent law, this court will not afford relief on a summary application.

This was an application to be discharged out of custody the defendant having been exonerated from the demand under the insolvent law.

[*108] **Per Curiam.* The defendant can take nothing by his motion. In the cause of *Caldwell v. Graham*, decided in January term, 1808, we determined we would not help an insolvent who omitted to plead his discharge as he might have done.[1]

Motion denied.

VAN DYCK, *q. l.*, *against* VAN BEUREN AND VOSBURGH.

When the court is divided, judgment must go according to the verdict. But if an intimation for a special verdict has been given, and the bench be afterwards full, a second argument will be ordered, if the special verdict be not agreed to.

A CASE had been made in this cause for the opinion of the court, but they being divided, no decision was made, and the plaintiff, having entered up judgment on his verdict, sued out an execution.

Williams moved to set aside this execution, on an affidavit stating that the application to this court was undetermined.

[1] See case of *Shaw v. Wilmerden*, 2 Cal. R. 88; *Van Valkenburgh v. Dederick*, 1 J. C. 133; see *Billings v. Shutt*, 1 J. C. 105.

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Vin Ness, contra, read an affidavit, stating the division of the court, and that by the rules of practice he was therefore entitled to the benefits of his verdict.

Per Curiam. We admit the general position, but as two of the judges who sat when this case was argued were disposed to recommend a special verdict, unless the parties now agree to one, we shall order a stay of proceedings till a further argument.

N. B.—It was mentioned to the court, that a case was now pending in error, between the same parties, in which the very point now in question would receive a determination.

GARDINIER, Gentleman, one, &c. against BUEL.

A notice to declare, plead, &c., need not specify "or that the default will be entered," but may say generally "or judgment."

THIS was an application to set aside the judgment of *nonpros* entered in this suit, on an affidavit by the plaintiff, stating, that on the 6th of June last, he was served with a copy of a bill of costs and notice of taxation, from whence he concluded a judgment of *nonpros* had been entered against him, but if any had been so entered it was without notice of any intended motion for that purpose, except what was derived from a notice served on him on the 24th of January last, of the entry of a rule in the common rule book of the clerk of this court, requiring him to declare before the end of February term then next, "or that judgment of *nonpros* would be entered."

* *Williams*, on behalf of the plaintiff. The rule. [*104]
in this cause ought to have been "that the plaintiff;

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declare or his default be entered," and on such default, judgment of *nonpros* would have been regular. Whenever an act is to be done by one party, on non-performance of which he will be in default, and the other party entitled to an advantage in consequence of the omission, the rule ought to express that "unless, &c. his default will be entered." On such a rule the next step is the entry of the default; and then follows the entry of the judgment; for the plaintiff is not bound to declare till called on regularly. 3 Burr. 1452.(a) Cole. Cas. Prac. 47, 48.(b)

Woodworth (Attorney-General) read an affidavit of the defendant's attorney, contra, by which it appeared that in July, 1803, he sent by the mail a notice of his being retained in that cause; that notice of a declaration being filed had never been given; that on the 10th of December following, a rule for judgment of *nonpros* was entered in the common rule book, of which notice was given on the 24th of January last; that of this notice an affidavit was made and filed in the clerk's office on the 11th of May last, on which the plaintiff's default was entered, and four days after, judgment of *nonpros* entered. This, Mr. Attorney contended, was the regular practice, and that the default, being only a consequence and legal effect of the neglect of the party, needed not to be mentioned. Inserting it as a mere matter of surplusage not required by the rules of this court. Besides the want of notice of filing a declaration is decisive against the application according to the determinations of this court.

Per Curiam. The defendant is regular in every respect. The plaintiff can take nothing by his motion.

Motion denied

(a) *West v. Radford.* Notice to plead need not be given within the same time that a declaration must be filed.

(b) *Oudenarde v. Von Bergen,* that a default must be entered to warrant an interlocutory judgment.

Bodwell v. Willcox.—Cole v. Grant.

BODWELL *against* WILLCOX.

Notice of motion need not specify the place where to be brought on.

IN this case an objection was taken that the notice of motion did not specify "at the city-hall of the city of Albany," but was only for the first day of the term, without designating the place.

Per Curiam. The notice is sufficient. Every one knows where the different terms are held, and the party himself evinces that, by coming here to oppose it.

*COLE *against* GRANT.

[*105]

THE SAME *against* KING.COLE ET UX. *against* GRANT AND KING.COLE *against* GRANT AND KING.

Where there are joint and several suits against the same defendants, and costs allowed them in some, but damages assessed against one, in another, the costs allowed them in all may be set off against the damages recovered, but not against the costs in that suit, the plaintiff's attorney having a lien on them.

COSTS had been allowed to the defendants in the three first of these causes, to 26 dollars and 53 cents, and in the last also, to Gideon King, to 14 dollars and 84 cents, but in the last cause damages had been assessed against Grant to 20 dollars besides costs, and Cole was unable to pay the costs taxed against him.

Russel, on an affidavit disclosing the above facts, moved

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to set off the costs allowed the defendants against the damages and costs recovered by the plaintiffs in the last.

Per Curiam. Let the defendants have leave to set off their costs in the three first causes against 20 dollars damages recovered by the plaintiff in the last. The costs of the plaintiff's attorney in the last suit not to be included in the set-off, as he has a lien for them.(a)

JACKSON, ON THE DEMISE OF SPILSBURY AND OTHERS,
against WATSON.

The claim for the value of improvements under the act of the 5th of April, 1803, will depend on the report of the circuit judge, to whom title must be shown. An offer to pay the appraised value made by the plaintiff before suit brought, will entitle him to costs.

THIS was an application to be paid for the value of improvements pursuant to the provisions of the act of the 5th of April, 1803, entitled, "An act granting relief to certain persons claiming "title to lands in the counties of Cayuga and Onondaga;" that till the improvements were paid for, execution on the writ of possession might be staid, and that the judgment on the verdict obtained might be entered without any costs of increase.

W. Woods, in support of the motion, read an affidavit, stating that the patent for the lands, to recover which the action was brought, was in the name of Jacob Spilsbury, who died previous to the 27th of March, 1803. That the defendant, in 1797, settled on the premises under a *bona*.

(a) *Spencer v. White*, April, 1799; 2 Bla. Rep. 867, 869, 871; 4 D. & E. 123; see also *Brown v. Cuming*, ante, 34, n. (a) and *Schemerhorn v. Schemerhorn*, 3 Caines' Rep. 190, n. (a).

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fide purchase, for the consideration of 387 dollars and 50 cents, and was in possession. That the improvements had not been appraised, nor had the value of them been tendered or paid.

Hildreth, contra, read an affidavit, mentioning that previous to bringing the suit, an offer was [*106] made to pay the value of the improvements. He urged also, that nothing was disclosed to the court evincing a claim in fee, or that the estate of the defendant was such as would, according to the act, entitle him to the value of his improvements. But admitting it was, it ought to be made appear in a legal manner. This could not be by the mere affidavit of the party. It must be proved by the same evidence as titles are, in other cases, substantiated. That this not being done, the defendant had not made out any right to what he claimed.

W. Woods, in reply. The acts points out no particular mode, and this has been adopted.

Per Curiam. Let the plaintiff have leave to perfect his judgment with costs to be taxed, and let all other proceedings be staid, that the defendant may have it in his power to apply to the chancellor, under the second section of the act, as he is entitled to the benefit of its provisions. See *Jackson v. Bush*, 8 Johns. Rep. 512, and *Jackson v. Seaman*, *ibid.* 495. As, however, the plaintiff, previous to the commencement of his action, offered to pay the value now demanded, we think him entitled to his costs, and we wish it to be understood, that in future, the claims of defendants to the value of their improvements under this act, will depend upon the report of the circuit judge.

Overseers of Germantown v. Overseers of Livingston.

THE OVERSEERS OF THE TOWN OF GERMANTOWN, IN COLUMBIA COUNTY, *Appellants*, against THE OVERSEERS OF THE POOR OF THE TOWN OF LIVINGSTON, *Respondents*.

Testimony of the declarations of a person as to owning a slave, cannot be received to render a parish chargeable when the person himself might have been produced.

THIS was a case from the Columbia sessions, submitted by consent without argument. The facts were these: Two justices, on complaint of the overseers of Germantown, had ordered Sarah Bridgend, a negro woman 80 years of age, to be removed to the town of Livingston, and adjudged her settlement to be there. From this order there was an appeal to the sessions, who received testimony of the declarations of one Philip Rockefeller, that she was formerly his slave, bought in the town of Livingston, and manumitted by him about 16 years ago, but they refused to admit Rockefeller himself, adjudged the negro chargeable to Germantown, and ordered her to be maintained there, reversing the order of the justices.

[*107] **Per Curiam*. The order of the sessions reversing the order of the justices must be reversed. The admission of the declarations of Philip Rockefeller, after he owned the slave, is too loose and uncertain to charge the town of Germantown. It would be of a very dangerous tendency. Better proof of the fact could be had. Was Rockefeller then in possession of the woman, it might be otherwise. The sayings of one inhabitant, to charge a whole town, might be mischievous, and would be very liable to abuse, especially if better testimony can be had.

Order of sessions reversed.

Van Antwerp v. Ingersoll.—Strowell v. Vrooman.

VAN ANTWERP *against* R. & J. INGERSOLL.

If on a plea of set-off in the common pleas the sum for which judgment is rendered be under 25 dollars, the plaintiff must pay costs to the defendant. In actions in the common pleas, on demands not exceeding 200 dollars, to be certified on the record by the judge if the plaintiff recover under 25 dollars, he pays costs.

THIS was a question of costs by consent submitted to the court. The facts were, that in an action in the common pleas, on a bill penal for 60 dollars, to secure two instalments, the defendant pleaded *non est factum*, with notice of setting off a receipt, which was allowed as to one instalment, and left a balance under 25 dollars due to the plaintiff.

The point was, whether the plaintiff should pay costs to the defendant.

Per Curiam. The plaintiff must pay costs. 1 Rev. Laws, 580. This was a plea under the act authorizing set-offs. 1 Rev. Laws, 347. The statute is positive and peremptory that judgment must be for the balance only. The penalty, therefore, is immaterial on this point, for the judgment is the test by which the costs are to be determined.

STROWELL *against* VROOMAN.

If there be a *lis pendens* in the common pleas, in which there has been no decision, this court will not take up the point on a case made and submitted by consent.

IN this action, which was still pending in the common pleas for Saratoga, a motion had been made in the court below in arrest of judgment, on which no decision had been

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pronounced. The counsel, however, on both sides, agreed to make a case of it, and submit the matter to the determination of this court.

Per Curiam. This practice is increasing, and becoming grievous. It is time it should be arrested. We ought not to decide cases, unless there be a *lis pendens* here.(a) We cannot otherwise enforce our decision, and the very point may come up again. We therefore must refuse taking up the case.

[*108] *SCHERMERHORN, MASON and BISHOP against
TRIPP, JUN.

If a tavern be kept in the house of a justice, and for his benefit, though the license be in the name of another, who also lives in the house, he is within the 20th section of the 10^l. act, and liable to trespass for issuing execution, having no jurisdiction. Plaintiff also before him, and constable executing the writ, are equally liable if they join in pleading general issue. On a joint plea in trespass, no separate justification can be set up.

ERROR from the common pleas in Rensselaer county. The suit below was trespass *de bonis asportatis*, against a justice of the peace, a constable, and a plaintiff, in a suit before the justice under the 10^l. act, for taking the goods of the defendant, in an execution on a judgment rendered

(a) Though there be a *lis pendens*, a judge at *nisi prius* is authorized in refusing to try it, if the issue be such as a court of law ought not to entertain. Therefore, Lord Loughborough would not permit a cause to be brought on, where the matter in dispute was the number of chances in playing an illegal game. *Brown v. Leeson*, 2 H. Bl. 43. And Lord Ellenborough followed his example, where the cause of action was a wager on an abstract point of practice. *Henkin v. Gerss*, 2 Camp. 408; 12 East, 247, S. C., an action not being maintainable on a wager on a point of law in which the parties have not any interest.

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by the justice. The defendants all joined in a plea of not guilty.

The evidence adduced was, that the justice lived in a tavern where he officiated as the tavernkeeper, made out the bills, and received payment for them, but that the justice did his business in a small out-room, and the license for the house was taken out in the name of the justice's son. This, however, it appeared from the justice's own declarations, was done to avoid the operation of the 20th section of the act. 1 Rev. Laws, 502. On this the defendants below demurred to the evidence. The court having given judgment for the plaintiffs, the cause came up on a writ of error, in which the general errors were assigned.[1]

Foots, for the plaintiffs in error, submitted the case on the facts presented by the record.

Woodworth, contra, relied on the words of the act, and the testimony being such as to bring the justice clearly within them. If so, as they all joined in the same plea, they are all equally responsible. For where, in trespass against several, all unite in a plea of not guilty, the separate justification which one might have pleaded, is gone. 2 Wils. 384. 2 Stra. 993.(a)

SPENCER, J. The same point has been decided in this court in the case of *Percival v. Jones*, which was an action brought by a resident freeholder, under the 3d section, (1 Rev. Laws, 492,) against a justice, for apprehending him on a warrant.

Woodworth was stopped by the court.

[1] See *Seas. L. 24, § 165, c. 20. Low v. Rice, 8 J. R. 409; Clayton v. Per Due, 13 J. R. 218.*

(a) The reason is because the plea being entire, cannot be good in part and bad in part, an entire plea not being divisible; consequently, if the matter jointly pleaded be insufficient as to one of the parties, it is so in toto. *Earl of Manchester v. Vale, 1 Saund. 28, n. (1.)* and the cases there.

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Per Curiam. From the evidence below it was conclusively shown, that the justice (Schermerhorn) was, in fact, a keeper of a tavern, or lived in one. If so, he had no jurisdiction to try the cause, (1 Rev. Laws, 502, s. 20,) and as the constable (Mason) joined with him and the plaintiff in pleading the general issue, they are all equally trespassers. Had the constable *pleaded separately, he would probably have been excused; but he has now involved himself with the others, and we cannot separate their fates.

Judgment of the common pleas reversed.

GOULD *ads.* SPENCER.

THE SAME *ads.* TILLOTSON.

WARD *ads.* SPENCER.

THE SAME *ads.* TILLOTSON.

If the names of two attorneys appear on the writ, subsequent proceedings may be in the name of one alone. Interlocutory judgment may be entered at any day after default, and before writ of inquiry executed.

In these actions, which were for libellous publications on the plaintiffs, in a paper entitled "*The Corrector*," judgments had been entered on default, and writs of inquiry executed.

James S. Smith moved to set aside the defaults, and inquiry of damages on an affidavit made by himself, stating, that by the writs sued out in these causes, Woodworth and Osborn appear to have been the attorneys on record for the plaintiffs, (a) but that the declarations were endorsed

(a) A party cannot plead in the name of a firm. Per Lord Ellenborough, in *Burn v. Guy*, 4 East, 195.

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with the name of Osborn only. That the rules also, which had been entered in these causes, were signed by the name of Osborn only, and this, without any order of court obtained for that purpose; and that the interlocutory judgments had been entered only four days before execution of the writs of inquiry.

Woodworth, (Attorney-General,) contra, insisted, that when a plaintiff nominates two or three attorneys, whose names appear on the writ, any one may alone sign and endorse all proceedings in the suit. Otherwise, in case of death, a new attorney must be appointed. But in the present case it was known, that after suing out the writs in these causes, he was nominated to the office he held, and therefore could not act as an attorney where the people are not concerned. On the last point, if the notices be regular, the entry of the judgment may be any time before inquiry executed.

Per Curiam. If the proceedings were not correct by being in the name of one attorney only, yet the defendants show no excuse for not applying at an earlier day of this term. This is fatal to their motion. Besides, it is sufficient if one of the attorneys appearing on the writ, continue to endorse and sign the proceedings. It must be presumed the defendants *were not misled, but [*110] knew they were the parties meant by the original writ. As to the second objection, there is no force in it. The settled practice is to allow of notice of inquiry being given at any time after default, and it is enough if the interlocutory judgment be entered at any day before execution of the writ of inquiry.

LIVINGSTON, J. I concur in the decision of the court on the question in this case. But I do not say, if two persons be attorneys on the writ, one may go on with the proceedings in his name singly. Were one to die, then the right to carry on the suit would survive. On the points now

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before us, I consider the appointment of Mr. Woodworth to the place of Attorney-General, as a species of civil death. Therefore, on the present occasion, I agree with the opinions of my brethren. The defendants can take nothing by their motion.

Motion refused.

 SCHOONMAKER *against* TRANS.

If a late decision be made of which counsel is not apprised, the court will in some cases allow of its being urged as an excuse for not making an earlier application. Under special circumstances a justice's return may be amended after errors assigned.

THIS was an application for a rule on a justice of the peace to amend his return, by inserting the evidence(a) he overruled in a cause before him.

(a) The practice of granting rules on justices to return the evidence has, since the provisions by statute for that purpose, (*Dodge v. Coddington*, 3 Johns. Rep. 147,) nearly superseded the amending the return. The rule seems to be, that wherever the testimony might influence the decision, the court will order an amendment, or that it be returned; as by inserting evidence, which had been rejected of a former trial for the same cause of action, *Feller v. Mulliner*, post, 384. But where the fact if returned would not vary the judgment of the court, it will not be ordered. *Keeler v. Adams*, 3 Caines' Rep. 34. If the justice in making his return has been imposed on by the attorney, leave will be given, upon notice of the motion and affidavit of the fact, to amend according to the truth of the case; (*Simpson v. Carter*, 5 Johns. Rep. 350,) but the court will not order a justice to amend his return contrary to what he has sworn; (*Keeler v. Adams*, *ubi sup.*) nor, after a precise and specific return to all the facts in the affidavit on which the *certiorari* was granted, will they order him to amend his return on facts in a subsequent and supplementary affidavit; (*Dutler v. McIntyre*, 3 Johns. Rep. 182,) nor will they take notice of facts returned from hearsay, as the justice must return from his own knowledge; (*Moseley v. London*, *ibid.* 193,) therefore, error cannot be assigned on such a part of a return. *Id. ibid.* See *Durkin v. Brackett*, 1 Caines' Rep. 501.

All affidavits to amend a return as to matters of fact, ought to state them,

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Smith read an affidavit showing that the cause had been brought up by *certiorari*, errors assigned and joinder. He contended, therefore, the application was too late.

Jones, contra. If we have been too late, it arises from a mistake of a decision of the last term, in which we thought the court had ruled they would order a return to be amended by setting forth the evidence overruled, when that evidence was the only reason on which the judgment could be impeached. No report is as yet furnished of this adjudication, and the knowledge we have of it is hearsay.

Per Curiam. We presume the counsel ignorant of the decisions of May and February terms last past, by which we allowed rules on justices, ordering them to return evidence in special cases. This therefore, is a sufficient excuse for the court to interfere at this late stage of the cause.

KENT, Ch. J. I dissent from this opinion. The counsel are bound to know the law at their peril. The court did not make any new rule, but only applied principles already known to new cases. It is a good rule, and ought to be enforced, *that after a party assigns errors, he waives all objections to the sufficiency of the return. [*111]

Motion granted.

that the court may judge of their materiality. *Leonard v. Sunderland*, 3 Caines' Rep. 136. As to misprisions, it seems never too late to apply for an amendment. It will be granted after argument on the errors assigned, and the judgment of the court pronounced; (*Day v. Wilber*, post, 376,) so if in the errors assigned after joinder; (*Moore v. Bacon*, 3 Caines' Rep. 53,) and after a rule to assign errors, a mis-statement of the form of the action may be amended by the affidavit on which the *certiorari* was granted. *Knapp v. Palmer*, 1 Caines' Rep. 486.

Dennis v. Ludlow.

DENNIS and WILLIAMS *against* LUDLOW.

Whether a vessel which moves down a river on the route in a voyage insured has actually sailed on it, is a fact depending on circumstances and the *quo animo*. If she has not taken her captain on board, it is a presumption that she has not commenced her voyage, though all her papers, clearance and lading be taken in. The nautical day begins at twelve o'clock at noon. On a warranty depending on a matter of fact, the jury are the proper judges.

THIS was an action on a policy of insurance on the body of the brig Brothers, Brown, master, valued at 4,500 dollars, at and from Savannah, in Georgia, to Martinique. In the margin of the policy was written "sailed early in October;" at the bottom of the instrument were inserted the following words: "A brigantine Brothers, Captain Parsons, it is said, has been spoken with at sea with a sick crew, warranted not to be the brig Brothers insured by this policy."

At the trial, the subscription of the policy, the interest, abandonment, a sailing on the voyage, and that the vessel had never been since heard of, were admitted. That Williams, one of the plaintiffs, was then at Savannah, and Dennis, the other, in New York, and continued there till the 7th of November, when the policy was effected, were facts acknowledged to be true.

The plaintiff also admitted that the bills of lading for the cargo were dated on the 14th of September, and the clearance on the 15th.

By the testimony adduced under a commission issued to Savannah, it appeared that the vessel, about the date of her clearance, dropt down from the wharf with a pilot on board, to a place called Five Fathom Hole, about three miles from the town of Savannah. That the crew were then all healthy and adequate to the ship's duty. That from thence she went about eleven miles further down the river to a place called Cockspur. That, both at Five Fa-

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thorn Hole and Cockspur, vessels of heavy burden finish their lading, and at the latter often wait for orders and overhaul their rigging. That the brig in question lay there sixteen days, on account of the sickness of the master, who on the evening of the 30th went on board, and sailed on the first or second day of October, on the voyage insured. That, in the opinion of one of the persons examined, Cockspur has always been considered as in the port of Savannah, and he *should think a vessel not out [*112] of the port of New York, till after she had left Sandy Hook.

The defendant on his part read in evidence a letter from the captain to the plaintiff Williams, dated the 30th of September, on board the brig Brothers. This epistle commences with these words: "At last, my dear friend, Mr. Williams, I am at sea, with all hands sick except two, and in a few days expect to get my men once more on their legs; they are all better to-day. The pilot says he shall charge six dollars extra for dropping to Five Fathom Hole, which I think unjust." On the trial the defendant, after due notice, called on the plaintiffs to show an account of pilotage against the Brothers which had been presented to the underwriters as one of the documents in proof of loss. The plaintiffs alleged it had not been returned, but the judge admitted evidence of its contents to be given, on proof being made of its having been submitted to the insurers, though no testimony was adduced to show by whom it was written. The heading of this bill was thus: "James Brown's bill of pilotage of brig Brothers. Took charge the 18th September; detention on board from the 13th to the 30th September.

| | <i>dols. cts.</i> |
|---|-------------------|
| "At two dollars per day, . . . | 32 00 |
| Vessel drawing 11 1-2 feet water, . . . | 16 50 |
| Dropping to Five Fathom Hole," . . . | 6 00 |

54 50

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The judge charged that if the vessel had not a competent crew when she sailed on the voyage insured, the underwriters were not liable. That the captain's letter was, in his opinion, more to be relied on than the testimony under the commission taken so long after the occurrence of the facts it stated. That in his opinion, the vessel could be considered, within the intention of the parties, as sailing on the voyage insured only from the time of her final putting to sea from Cookspur, and what that time was, was a matter of fact to be determined by the weight of testimony, of which they were the competent judges.

Upon this direction, the jury found for the plaintiffs, and the defendant moved to set aside that verdict.

[*113] *Pendleton, for the defendant. The learned judge before whom the cause was tried, misdirected the jury as to the compliance with the warranty, respecting the sailing of the Brothers; because, when she broke ground with her clearance, cargo and papers on board in the river, she commenced her voyage, and the period of her departure must be dated from thence. If this be not so, she in fact went to sea on the 30th of September. Thus says the captain's letter; thus the calculation from the bill for pilotage: 16 days from the 13th of September make exactly the time, allowing one day for going to Five Fathom Hole. This, as evidence adduced by themselves, in support of their claim, is conclusive.(a) Secondly, there was an undue concealment in not communicating that the vessel was detained two weeks in the river, this being proved to be material, from the health of the crew of another brig of the same name having been made a subject of warranty. The warranty of the vessel's sailing has not

(a) *Grozart v. Smith & Smith*, sittings at New York, 17th November, 1802, before Livingston, J. The plaintiff had given in the amount of his freight claimed, to have his proportion of an average against the underwriters ascertained. On notice to produce it, and the adjustment, he did not comply. Parol evidence admitted, and the learned judge seemed to think him concluded by his statement.

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been complied with, whether we consider her departure from Cockspur or the wharf the true criterion. That it was not in October is evident. The captain says on the 30th of September he was at sea, and this letter in which he so says was shown to substantiate the loss. This, then, was previous to the day of departure warranted. We contend that the judge was incorrect in his charge as to what shall be deemed the time at which a vessel sails on a voyage insured. When she has all her cargo and all papers on board, she must be considered as on her voyage from the time of making sail outwards. In *Bond v. Nutt*, (Cowp. 601,) on an exactly similar point, the whole question turned on whether the vessel was "on her voyage homeward." Cowp. 606. There, notwithstanding she, in strict terms, but not in law, deviated a little, for the purpose of meeting with convoy, the underwriter was liable, because her first departure was within the policy. So in *Earl v. Harria*, Doug. 343, 357; *Thelluson v. Ferguson*, *ibid.* 343, 361. On the point of concealment there can be very little doubt. The fact of all the hands being sick, but two, was known to Williams; the knowledge of one partner must, in this case, be the knowledge of both, especially as it was from such partner that the orders for insurance came, and the date of Brown's letter shows, that after [*114] its receipt, the instructions for insurance must have been forwarded.

Riggs and Hoffman, contra. So far as matters of fact are concerned, the jury have determined, and by their verdict it is evident they decided, that the vessel sailed according to the warranty, for that was the point submitted to them. It is a matter of fact as to time; that time they have found to be "early in October." If we suppose, what is very natural, the 13th to have been mistaken for the 15th, which, as the clearance is on the 15th, is a reasonable supposition, then the 16 lay-days will bring it exactly to the time; 16 and 15 make 31; and on the 1st of October, the pilot

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swears she sailed. If the captain wrote his letter on the morning of the 1st of October, as all sailors, when at sea, compute by the nautical day, it would be the 30th of September. They begin their day at 12 o'clock at noon, consequently, it does not determine till 12 o'clock in the next day, which is 12 hours after our day has run. The first day therefore, of any month is, to a sailor, 12 hours after that day has commenced, according to the reckoning of a landsman; because the computation at sea is from the meridian observation, from 12 to 12 in the day; but on shore, from 12 to 12 at night. It is manifest, then, the first part of a sailor's day is one day behind that of the landsman; and the last part of a sailor's day is one day before it. This the jury took into consideration, and found accordingly. The true point of time at which we say a voyage commences, is that point at which a vessel weighs anchor, with the idea of no longer stopping. Everything else is *in preparatorio*. It is in evidence that the going to Cockspur was for the health of the crew, and to wait for the captain. That vessels load there, and it is considered as in the port of Savannah. To say when a vessel, loaded and cleared, moves from a wharf is a commencement of a voyage, would be to say, if a vessel draws into the stream she is on her *iter*. A departure, with intent to proceed, can never be asserted before the captain is on board. The case shows that did not happen till the 30th of September. In Park, 338, it is expressly said, that a vessel is not deemed to have left the port of London till she has quitted Gravesend, 20 miles below the place from whence she sails; because to that extent the port of London [*115] *reaches. At Cockspur, therefore, the voyage commenced. The climate of Savannah, and the constant weakly state of the crews at the period when the Brothers sailed, is matter of general notoriety, and therefore need not be communicated. *Carter v. Boehm*, 3 Burr. 1905; 1 Bl. Rep. 598, S. C. No concealment of a material fact can therefore be pretended; and the testimony is con-

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clusive that the *Brothers* was a healthy vessel. The argument derived from the bill for pilotage can have no kind of weight; because the only reason why parol evidence of a paper can be given, is, that the party served with notice to produce it, has it in his possession. Nothing of that kind appears here. Besides, it was not evidence, nor would it have been so, had a regular protest been made.

Harrison, in reply. A protest is not received as evidence, because it is supposed the captain can be produced. It has been decided that a paper produced by a person, though not allowed to be evidence for him, was conclusive against him. If so, allowing the letter not to be regular testimony, it is by the act of the plaintiffs in bringing it forward made good. It is to be remembered, too, they were partners; that the knowledge of the one was the knowledge of both, and on this account, as all that Williams knew is not pretended to have been communicated, there was an undue concealment. Whether the ship sailed pursuant to the warrant, depends on what shall be the time and place of departing on her voyage. She must be considered as on her route from the instant when she begins to move towards her port of destination with an intent so to do. Otherwise, in a large port, such as New York, the policy, if it be *from* the port, will not attach during a period that may be as replete with danger, as any part of the voyage. This would expose all our commerce to be at the risk of the merchant, for the whole length of the river, down to the Hook. The reason why a vessel sailing from the port of London may be said not to leave it till she passes Gravesend, is, that she there takes on board her last paper, the cocket. That reasoning will not apply here.

KENT, Ch. J. delivered the opinion of the court. The defendant moves for a new trial on the following grounds:

1. Because the time of sailing was when the vessel broke ground at Savannah, with her clearance, cargo, *and papers on board; 2. Because in fact, [*116] she went to sea on the 30th September; 3. Because

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the brig had a sick crew, and was detained in the river two weeks, and these facts were material and ought to have been disclosed, they showing that she was not competently equipped when she sailed. It is admitted as a fact, ascertained since the trial, that William Brown, when he wrote the letter stated in the case, was part owner of the brig; and further, that the vessel cleared out at the custom-house at Savannah, for Martinique, on the 15th of September, 1799. 1. As to the inception of the voyage (see *Henahau v. Mar. Ins. Co.*, post, 274,) by sailing from the port of Savannah, or from Cockspur; this will depend on the *quo animo*, or *bona fide* intent of the party. In the present case, it is very clear the voyage did not commence till the vessel left Cockspur. She left the port of Savannah for a temporary purpose, distinct from the object of the voyage, and the captain was left behind sick. I have no doubt that the sailing in the policy, when accompanied with the explanatory facts, meant the going to sea from Cockspur. 2. With respect to the real truth of the case, whether the vessel did actually sail from Cockspur prior to the 1st day of October or not; and whether, when she sailed, she had a crew, in point of health, competent for the voyage, there is undoubtedly a contrariety of evidence, and a difficulty in arriving at a satisfactory conclusion. On the one side there is the written testimony of the captain's letter, and the account of pilotage from James Brown (supposing it to be a true paper) in favor of the allegation, that the vessel must have sailed prior to the time stated in the warranty. On the other side, it was proved by the pilot who conducted the vessel to sea, and supported by the testimony of two other pilots who attended him, that the vessel did not leave Cockspur before the 1st of October. In deciding on the preponderance of these contradictory statements, I feel and acknowledge the force of the remark of Baron Gilbert, that written testimony must, from the nature of man, be of higher credit in the scale of probability; but on the other hand, there are just criti-

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cisms to be made respecting these papers, which must bring them down to a level, at least, with the underwritten documents. One is, that seamen reckon at sea from noon to noon, and would naturally date *a [*117] letter written at sea before 12 o'clock of the 1st of October, as of the preceding day; and another is, that the pilotage bill was probably mistaken as to figures, and that the 13th was intended for the 15th. If so, that account will correspond with the allegation that the vessel sailed on the 1st of October; and the reason to infer this is, from the facility with which such a mistake as to those figures may arise, and from the fact, that the bills of lading were not signed till the 14th, which would bring it a day after the sailing according to the one construction. The facts respecting the crew's health seem to be involved in equal uncertainty, and as these were all questions of credibility and fact, proper for the decision of the jury, which were fairly submitted to them, and there is no reason to suppose any new light can be thrown on the subject, and the best informed man may, and would, probably, differ as to the facts, we are of opinion the verdict ought not to be disturbed. We the more easily adopt this opinion when we consider that the principal point in the cause, whether the vessel did actually sail on the 30th September, or 1st of October, is a matter of *summum jus*, and is to be reckoned among the *apices* of the law, rather than a part of the substantial merits of the case; therefore the defendant takes nothing by his motion.

New trial refuse?.

Roget v. Merritt.

ROGET *against* MERRITT and CLAPP.

On an agreement to accept notes in payment of goods sold, if before delivery the notes turn out bad, a tender and refusal of them is no payment, unless the vendor agreed to run the risk of their being paid.

THIS was an action for not delivering 220 barrels of flour, according to agreement. On the trial the following appeared to be the circumstances of the case :

The plaintiff, through the intervention of a broker, known to be acting for him, about the 18th of January, 1800, asked the defendants if they would sell the above quantity of flour for the note of Joseph Lyon. They replied, they would give an answer if he would call the next day. He called, and produced a note of Lyon's for two thousand two hundred and fifty dollars, drawn in favor of one John Palmer, and endorsed by him in blank. At the same time the agreement was made by the defendants [*118] to sell, and a memorandum of the sale given to the broker, in this form :

" 220 barls. S. Flour,
"\$10—\$2,200—For Lyon's note,
" 1 mo. 18th, 1800, " MERRITT & CLAPP."

When this was done, it was understood that the difference between the note and the value of the flour should be paid by the defendants, but the note was not delivered over to them.(a) Shortly after they met the broker, and asked him why he did not take away the flour; to which he replied, the plaintiff was not yet ready for it. In a few days the broker called on the defendants, and demanded the flour, tendering the note at the same time.

(a) *Quære*, whether the delivery would have altered the case, without an actual agreement to take the chance of payment. See 7 D. & R. 65, the words of Lord Kenyon.

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The defendants, however, refused to deliver it, alleging, as a reason, that the maker had failed the day before. When the note was thus tendered, whether it was endorsed or not by the plaintiff, did not appear, though at the time of trial his name was on it, but in a great measure obliterated.

The declaration contained three counts. The first, on a special agreement, made on the 18th of January, 1800, to deliver 220 barrels of superfine flour, at 10 dollars per barrel, to be paid for in a note of one Joseph Lyon, bearing date the 7th of November, 1799, payable five months after date, with an averment of a tender and refusal, on the 30th of January, 1800. The second count, on a sale of 220 barrels, &c. to be paid for in a similar note, in consideration of which sale, and a promise of the plaintiff to pay in such a note, the defendants promised to deliver, with an averment of a tender and refusal.^(a) The third count on a sale by the defendants to the plaintiff of 220 barrels of superfine flour, at ten dollars per barrel, with an averment of an offer to pay, demand and refusal.

The general issue being pleaded to all the counts, a verdict was taken for the plaintiff by consent, subject to the opinion of the court, whether it should stand or a nonsuit be entered.

Hamilton, for the plaintiff. Whenever a specific thing is to be exchanged for another thing, after the agreement is completed, the article, that is, as it were, the price of the purchase, is at the risk of the vendor, and the goods sold at that of the vendee. This is a principle both in

*the Roman and our law. Just. lib. 3, tit. 24, s. 3. [*119]

(a) Where a sale of goods is made at a certain credit, to be then paid for in a bill at a certain date, and no particular bill is specified, it means a bill accepted by the vendee; therefore, in an action by a vendor for not giving a bill in pursuance of such a sale, the plaintiff must prove that he drew a bill on the defendant, who refused to accept, and the circumstance that the defendant was insolvent and had dishonored his acceptances is not a dispensation to the plaintiff. *Reed v. Mestier*, 2 Com. on Cont. 229.

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fol. 78; 2 Bl. Comm. 446, 449. Exchange is where one thing is to be commuted for another, and such was the case here: a note was to be given for the flour, not money to be paid; therefore, the loss from the note's proving bad(a) to be borne by the defendants.

Riker and *Harrison*, contra. The principles relied on do not apply. The plaintiff cannot recover on either of his counts. The first and second are not maintained by the evidence. The first is on an agreement to pay a certain specific note of the precise sum; the written agreement or memorandum refers to no such note. The second can as little be maintained; it states the sale to be for a similar note: the evidence is, that it was to be paid for in one of 2,250 dollars, and the difference to be paid by the defendants. In *Penng v. Porter*, 2 East, 2, the court of king's bench held that a contract to deliver 40 or 50 bushels of wheat, at the option of the plaintiff, must be declared on in the alternative, and not as an absolute contract, though the plaintiff had elected to deliver only forty. That case, and those to which it refers, establish the evidence in this to be fatally variant. On the third count there can be no recovery, for there was not a particle of evidence in its support. Besides these objections, the contract is void under the statute of frauds, for the memorandum or agreement was signed only by one party, and therefore, though obligatory on them, could not be enforced against the plaintiffs: this renders the whole a mere *nudum pactum*. The cases on stock contracts evince this; for though one may sign, obliging himself to sell, that, without a counter instrument binding the other to accept, creates no bargain. In addition to the authority from East, we rely on the anonymous case from 1 Lord Raym. 785, and the references there made.

(a) A note, bill or draft, which turns out to be unproductive, if given in payment, may be treated as a mere nullity. *Packford v. Maxwell*, 6 D. & R. 52; *Owenson v. Morse*, 7 D. & R. 64.

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Hamilton, in reply. The only object of the statute of frauds was to afford written evidence of a contract. Both from the words^(a) and the principle of the act, it is unnecessary both parties should execute. If one sign and deliver over, it is enough; especially when the person to part with the principal thing, the subject matter of sale, is he who signs. It has been decided, that the mentioning in a letter that a party had agreed to do a thing, is a *sufficient signing within the statute, though there [*120] was no specification of what was to be done.^(b)

Vin. Abr. tit. Agreement. Therefore, any note or memorandum is sufficient to take it out of the statute. A signature alone will not, without consideration, create a contract, it is true; but if a contract is disclosed by the signature, then the consideration may be shown—here it appears. Though a special agreement must be strictly proved, yet that strictness is not a literal strictness, but only as to essential circumstances.

SPENCER, J. delivered the opinion of the court. On the part of the defendants, two objections were raised to the plaintiff's recovery: 1. That in neither of the counts is the contract set forth correspondent to the proof, and that therefore there is a fatal variance; 2. That the contract between the parties is a *nudum pactum* and within the statute of frauds and perjuries. The opinion I am about to give not being founded on either of the objections taken, it will be unnecessary to enter into a minute examination of them. To support the first exception, the defendants' counsel rely on that part of the proof, whereby it was agreed that the defendants should pay the difference between the flour and note. This undoubtedly was an essential part of the contract, and, according to the rules of pleading, ought to have been stated. The second exception appears to me untenable, and the true answer was given to it by the plaintiff's

(a) The words are, "made and signed by the parties."

(b) See *Clark v. Wright*, 1 Atk. 12, contra, and the authorities there.

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counsel: the statute of frauds requires, in certain contracts, a memorandum to be signed by the parties to be charged; if there are acts to be done by both parties, and the one who is to perform a principal part (as here the delivery of the flour, sign, and it is accepted by the other party, there can exist no doubt but that such contract would be mutually obligatory. In this case, I hold that there was a valid contract, executory in its nature; but before the period of its execution arrived, the consideration agreed to be given by the plaintiff wholly failed, by the insolvency of Lyon. The offer by the plaintiff to pay in the note of a bankrupt, was not an offer of payment. In the case of *Owenson v. Morse*, 7 D. & E. 64, and *Puckford v. Maxwell*, 6 D. & E. 52, it is recognized as settled law, that upon an agreement to accept notes in payment, if before the delivery of the [*121] articles *purchased, the notes turn out not to be good, a tender of them is not to be considered a payment, unless it was part of the agreement to take them as such, and to run the risk of their being paid.(a) It would be highly inequitable for the plaintiff to recover in this action, when the defendants have received no manner of consideration on the contract. We are therefore of opinion, that, on the merits, the defendants are entitled to judgment.

Judgment of nonsuit.

(a) The same point was ruled in *The People v. Howell*, 4 Johns. Rep. 296, and *Johnson v. Weed and another*, 9 Johns. Rep. 310, and further, that a receipt in full is not a proof of an agreement so to accept them. But though there be such an agreement, if, at the time it be entered into, the vendee give a fraudulent representation of the responsibility of the maker of the note, the vendor may still consider it as a nullity, and proceed on the original contract. *Wilson v. Fries*, 6 Johns. Rep. 110. The law is the same, though the payment be in bank notes which prove forged, notwithstanding the vendee passed them innocently. *Markle v. Hatfield*, 2 Johns. Rep. 455. For a note is not payment unless duly honored. Even when the above circumstances do not occur, it merely suspends the right of action till due, at which period, if not satisfied, the party may resort to his original cause of action. *Putnam v. Lewis*, 8 Johns Rep. 389.

 Stewart v. Eden.

R. and H. STEWART *against* M. EDEN, executrix, and J. and M. EDEN, executors, of M. EDEN, deceased.

If a maker of a note cannot be found when it is due, evidence of *that* is sufficient to support the general averment that the note was presented, and payment refused. If the endorser of a note dated in New York, have a house there, and also one on York-Island, notice of non-payment left at his house in New York is good. [1] If a holder of a note release one of several joint makers, excepting from such liability as he may be under to the endorsers, those endorsers cannot, in an action against them by such holder, set up such release in discharge. If the endorser of a note die before it fall due, and the holder in an action against the executors state that the endorser promised in his lifetime to pay, it is fatal, and on such a count a recovery cannot be had.

THIS was an action by endorsees, against the executrix and executors of the payee endorser, on a joint promissory note, made in New York, by Waring and Medcalf Eden, one of the defendants in the suit.

The declaration was in the common form, stating a demand on the makers, their refusal to pay, notice to the deceased in his lifetime, his liability thereon, and assumption to pay; but nothing special was alleged. To this *plene administraverunt*, and *non assumpserunt* were pleaded; on the latter of which issue was joined, and to the former the plaintiffs replied they had not fully administered. The several signatures being admitted, the plaintiffs, to prove the demand on the makers, gave in evidence that the note,

[1] Want of demand on the acceptor or maker will be excused when he cannot be found, and may be given in evidence under an averment that the note was presented, &c. *Herring v. Sanger*, 3 J. C. 71; see *Root v. Franklin*, 3 J. R. 207; *Cumming v. Fisher*, Anth. N. P. 1; *Anderson v. Drake*, 14 Johnson, 114; *Woodworth v. Bank of America*, in Error, 19 J. R. 230; Contra: S. C., 18 J. R. 315; *Ogden v. Cowley*, 2 J. R. 274; *Scofield v. Bayard*, 3 Wend. 488; *Cayuga Co. Bank v. Hunt*, 2 Hill, 635.

If the endorsee of a note be dead at the time it becomes payable, and there are executors or administrators, known to the holder, notice of non-payment must be given to them; they represent the testator or intestate. *Merchants' Bank v. Birch's Exrs.*, 17 J. R. 25; see *Willis v. Green*, 5 Hill, 234; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236.

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was, on the 8th of November, 1798, the day when due, presented at the store of the makers, but no person being there, the porter who demanded payment went into an upper room, where he was informed that Waring and Eden were out of town, but that a young man opposite was their clerk. The note being then presented to him, he said, instructions to pay it had not been left. The day after this a notice in the usual form was carried to the dwelling-house of Medcalf Eden, the endorser, which was found fastened up, and on this the bearer of the notice rolled it up, and put it into the keyhole of the outer door. It was admitted that the deceased, Medcalf Eden, shortly after the note was made, retired to his country seat, four miles from the city of New York, where he died on the 18th of September, 1798. That the will, under which the defendants acted, was not proved until the 19th day [*122] *of December, 1798, before which period the plaintiffs knew not of any will, or who were executors; and that the defendant Martha had never intermeddled with the affairs of the deceased, though enough had been left by him, at his country seat, to pay the bill in question, but that it had been sold under executions against the other executors, to satisfy debt due from them in their own rights. It appeared also that the plaintiffs, on the 17th of June, 1801, executed to Henry Waring, one of the makers of the note on which the present action was founded, an instrument in which, after reciting the note, the following discharge was contained:

“In consideration of one dollar, to us paid by Henry Waring, we do hereby absolutely release and discharge him from all claims, suits, and demands which we have against him, on account of the note of which the above is a copy, excepting always, that he shall be responsible to the executors and executrix of Medcalf Eden, deceased, and to them only, we guarantying him against any suits to be brought on the same, by any other person or persons, obtaining the note in any way, except from the executors

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or executrix, and this release or discharge shall not be construed to affect our claim in any manner against the said executors and executrix.

(Signed)

"R. & H. STEWART."

On the trial, the counsel for the defendants raised the following points:

1. That the proof, as adduced by the plaintiffs, did not support their declaration; because it is in that stated, that at the time the note became due, it was shown and presented to the makers and payment demanded of them; whereas the testimony was, that they were not to be found, and therefore a variance between the fact stated and the evidence given.

2. That the count states notice of non-payment given to the endorser, by reason whereof he became liable to pay, assumed, and refused, which could not be, as the endorser died before the note was due.

3. That the discharge and release to Henry Waring, one of the makers, was an exoneration in law of the endorser, and consequently of his executors.

*4. That notice of non-payment ought to have [*123] been at the country house of the endorser.

5. That as Martha Eden, the executrix, never intermeddled with the estate of the testator, against her judgment *de bonis testatoris* only ought to be entered, and she not held responsible in her own right.

It was agreed, however, that a verdict should be taken for the plaintiffs; but that if the opinion of the court should be for the defendants, upon either the first or second points, a nonsuit to be entered: if for them on the third and fourth points, or either of them, the defendants to have the verdict entered for them; and if, on the testimony as admitted, the court should think there was no evidence to charge the defendant Martha Eden personally, then the judgment to be *de bonis testatoris*.

Ricker, for the plaintiff. On the first point made by the
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defendants, it is sufficient to say, if a maker of a note, or drawer of a bill, cannot be found, or has deserted his country, a demand at his place of residence is sufficient. Kyd, 88, (edit. 1795, p. 188,) who for this cites Malynes. The same position is in Chitty, 99. It may be still urged that the demand is not duly alleged, and for this will be cited Baley, 109, but the decision there has been overruled. In *Saunderson v. Judge*, (a) 2 H. Bl. 511, it is said by the court, "it is not necessary that a demand should be personal; it is sufficient if it be made at the house of the maker." Therefore, if it be on a servant, a wife, or a child, it is enough, and the manner need not be stated. On the second objection, though we admit the endorser died before the bill was due, yet as the assumption of an endorser is only a conclusion of law from the facts, it is never proved; it is a mere formal averment. If a drawee be dead, the presentment should be, I confess, to his representatives; and the same reason applies to an endorser. But that is only in case the representative lives at a reasonable distance. Chitty, 71. But if there is no executor, then notice at the house of the deceased is all that can be given. Chitty, 181, 182. As to the third ground taken, there is not any thing better established than that there must be an actual satisfaction of a bill or note by the maker or drawee, to discharge the parties antecedent to the holder.

An ineffectual execution against the maker; nay, [*124] *letting him out from execution on a letter of license, is inadequate to work a discharge. *Hayling v. Mulhall*, 2 Bl. Rep. 1235. Bayley, 87, 88. Chitty, 182, 183, to the same effect. But it will be said we compounded. The only reason why a composition with a maker or drawer releases the endorsers, is, because it takes away the remedy of the holder. *Ex parte Smith*, 3 Bro.

(a) In this case the note was made payable at the banking-house of Saunderson, and the question was, whether a demand there was not good. The court held it was, and sufficient proof of the general averment of having been presented to the maker for payment.

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Ch. Rep. 1. This argument cannot operate here, for the right of the defendants is expressly saved. It is to be recollected that Waring, the person released by the plaintiffs, was a partner with Medcalf Eden, one of the executors, and if the act of one partner is the act of another, and that of one executor the act of all, then, from the privity of the situation he occupied, a consent may be implied on the part both of the makers and defendants. The not presenting at the house in the country, which is fourthly insisted on, must fail, because the endorser was not to be sought for at both his dwelling-houses; for if a presentment at one is bad, a presentment at the other would be equally so, and two bad presentments can never make a good one. On the last point, if the defendant Martha Eden had a good defence, it ought to have been pleaded separately; but as she has joined with the other parties she is concluded. *Middleton v. Price*, 1 Wils. 17; Esp. N. P. 336; *Philips v. Biron*, 1 Stra. 509. These, it is true, were actions of trespass, but the principle is the same.

Woods and Harison, contra. The case cited from H Blackstone mentions the declaration to have been in the usual form; the one now before the court we say is not so, and for that we adduce a precedent in 1 Went. Plead. 307, referring to Carth. 509, where the words "*non fuit inventus*" are used, and this is the authority Bayley relies on in page 109. This principle is particularly laid down in *Rushton v. Aspinall*, Doug. 654, 680, where the court say, that though a declaration may omit an inference of law, when it sets forth premises to warrant that inference, yet, when it does not state those premises, the court cannot make the legal inference. This reasoning and authority fully establishes the second objection, for the executors could not assume unless applied to. The precedents in Went. Plead. on this very point, show the form that ought to have been adopted, and the manner in which the notice to the defendants should have been expressed. A promise to a testator

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[*125] *will not be maintained by showing a promise to his executors. *Dean v. Crane*, 1 Salk. 28. The forms of pleading, therefore, require that the notice to the defendants should have been set forth. The fourth point speaks for itself. The country residence of the endorser was known, and if the law required the notice to him to be given *there*, *a fortiori*, would it in the case of his representatives. But our principal reliance is on the release. In *Kellock v. Robinson*, 2 Stra. 745, taking part payment from a maker of a note was held a discharge of the endorser. The exception in the writing executed by the plaintiffs was merely to enable them to sue the defendants. It was a nominal exception, and then, on the principle of *English v. Darley*, (a) 2 Bos. & Pull. 61, this species of exception will not destroy the effect of the release in exonerating the makers. The same doctrine is found in *Evans, on Money Had and Received*, 163, 170. Besides, it is a maxim, that where an exception goes to destroy the substance of an instrument, the exception is void, but the instrument stands good. So here, the exception is for the sake of defeating the legal operation of the act done. On the fifth point, the strict rule of practice may, perhaps, be against us; but as it is evident, on the face of the case, that the *devastavit* was not by Martha Eden, perhaps judgment (if any is to be rendered against the defendants) ought, as to her, to be only *de bonis testatoris*, for the *devastavit* of one executor is not the *devastavit* of another. Toller's Law of Exec. 342.

Hamilton, in reply. The notice to the maker must be held good, because every person in his situation is supposed to promise that his note shall be paid at the place where dated, unless the contrary appear on the face of the instrument. I remember a case, where a person not resi-

(a) In that case it was ruled, that a holder of a note receiving from the maker part payment, and security for the residue, with an exception of a nominal sum to enable him to sue the other parties, released all the endorsers.

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dent in this city drew a note, which was protested and recovered on, though no inquiry was made elsewhere. This is the law of France on this subject, and it certainly has all the advantages of convenience. If so, then on his not paying when demanded, the endorser became liable, and it is enough to state the right according to legal operation and effect. *Minet v. Gibson*, 1 H. Bl. 569; *Bishop v. Hayward*, 4 D. & E. 470. The release, as it is called, is not so; it is not under seal; it cannot be in any form pleaded as a discharge.^(a) Not as an accord and satisfaction. In short, to substantiate it,*chancery must be resorted to. [*126] That the exception is destructive of the instrument, may perhaps be urged by Waring, but surely not by Eden. But the instrument is not defeated by the exception; it was a contract in which Waring agreed to remain liable to the defendants,^(b) and therefore the exception is in affirmance of the intent of the parties.

LIVINGSTON, J. delivered the opinion of the court. If the maker, when a note falls due, cannot be found, nor payment demanded of him personally, should not the declaration state that fact specially, instead of averring, generally, "that the note was presented and payment refused?" This is the first question made in this cause. It is agreed, that the plaintiffs might have stated what particular diligence they used, in lieu of alleging, as they have done, that the note was "presented to the maker, and by him dishonored;" but it has been most usual to pursue the latter course, and no good reason can be assigned for departing from it. Under an averment of the note's being presented, the party has hitherto been permitted to give evidence of any diligence which is deemed equivalent to

(a) There certainly could be no difficulty in pleading this as an agreement and satisfaction.

(b) As one of the executors was one of the makers of the note in question, *quære*, whether any action could have been maintained by them against the makers. See *Mainwaring v. Newman*, 2 Bos. & Pull. 120.

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an actual presentation of it to the maker. Precedents are generally this way, and if in some, the whole matter intended to be insisted on as evidence of a demand be set forth, it only proves that either form is good. In *Saunders and others v. Judge*, 2 H. Bl. 510, the declaration stated that "the note was presented to the maker for payment." No demand, however, had been made of him, for he had absconded, and could not be found. The judge, therefore, nonsuited the plaintiffs, supposing an actual demand necessary. This nonsuit was set aside, although it was contended, as here, that the plaintiffs, having averred that the note was presented to the maker in person, ought to have been held to proof of that fact. The court disregarded this objection, and recognized the principle that due diligence in the holder to obtain payment, without an actual demand, is good evidence to support such averment. It is true, that in *Bayley on Bills*, p. 110, it is said, "that if a note be alleged to be presented, and payment refused, evidence cannot be given of the maker's not being found;" but this is a decision at *nisi prius*, on which it would be [*127] capricious to alter a practice of declaring, *which has been pretty uniformly followed, since the introduction into general use of bills of exchange and promissory notes. The case of *Sturke v. Cheesman*, from Carthew, so much relied on by defendants, prove nothing more than that it is sufficient to aver that the drawer of a bill was not found, without stating that inquiry had been made after him, and that such form of declaring is good. This is not disputed; but it does not follow that no other form will do. My opinion therefore is, that the present averment was sufficiently supported by testimony, that the makers, on inquiry at their store, could not be found; and that payment was therefore demanded of a clerk, who said they were out of town, and had left no instructions to pay the note. 2. Ought notice of the maker's default to have been sent to the endorser's country house? The note being dated in New-York, the maker and endorser are pre-

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sumed to have resided, and contemplated payment, there. It is admitted, indeed, that the endorser did reside in the city at the time of its date, for it is stated, that shortly thereafter he went to his country seat, shutting up his house in town. We must take care that, while proper diligence be imposed on the holder of negotiable paper, we do not exact from him every possible exertion that might have been made to affect an endorser with knowledge of its being dishonored. If he has done all that a diligent and prudent man could naturally and fairly do under like circumstances; if the law has prescribed no certain way of sending a notice in the given case; if the endorser's own conduct has rendered it somewhat difficult to determine in what way the notice ought to be given; and especially, if from what has been done, it may reasonably be presumed that notice has reached the parties concerned, we should be satisfied, and not ask for more. Endorsers, therefore, cannot complain, if notices of this nature are permitted to be left at their houses in town notwithstanding their removal into the country during the hot months. It is more reasonable that they leave a person in town to attend to their business, than that the holders of their paper be put to the trouble of finding out to what part of the country they have removed and sending after them. It is also probable, especially when the distance between the two houses is only four miles, as it was here, that some communication *will be kept up between them, and that a letter [*128] left at the dwelling in town will not be long in finding its way to the country. I speak now of a temporary residence in the country; for a permanent removal from the city might render a different course necessary. Nor was it fatal to direct the notice to the endorser himself; for as it was not known whether he had made a will, nor who his executors were, until long after, it was full as probable that it would reach the parties interested by this address as by any other; some one of the deceased's family would either open it, or see it safely delivered to an execu-

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tor. The notice, therefore, was well served, and its address proper. 8. What is to be the effect of the writing given to Waring, one of the makers of this note? The defendants cannot complain of this transaction, nor should they be permitted to derive any benefit from it, unless their remedy against the makers, or either of them, be affected by it. If we understand this paper according to the obvious meaning of the parties, and its own import, (and why should it not be so understood?) we may give to it every effect it was intended to produce, without impairing any right of the defendants. The plaintiffs were willing to release Waring, but only on condition of his remaining liable to the representatives of the endorser, and to those to whom they might pass the note. This was necessary to secure their own recourse on the executors of Eden's will. Nor is the exception repugnant to the main object of the release, if it may be so called; for Waring might have set-off against Eden's estate, and therefore be willing to remain liable to his representatives. This instrument, therefore, is no bar to the present suit. 4. As Medcalf Eden died long before the note became due, it is contended that the evidence not only does not support the promise alleged to have been made by him, on the 8th of November, 1798, which was after his death, but shows that it was impossible he could have made it. Averse from nonsuiting the plaintiffs, and thus turning them round to another action, we have been anxious to overcome this objection, but after the best reflection it appears to us fatal to the present suit. Although, when the holder of a note has done all that is required of him, the law implies an undertaking on the endorser's part, yet where the condition on which *this

[*129] promise arises happens not until after his death, the assumpsit devolves on his executors, to avoid the absurdity of a dead man's contracting. The assumption, as here laid cannot be made good by relation to the date of the note, or endorsement, for it is not merely because of his endorsement that Eden was liable. There must first be a default in the

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maker, and certain acts done, or diligence used by, the holder. It is accordingly stated in this declaration, that by reason of a demand of the maker, and non-payment by him, and notice thereof to Eden, he became liable, and being liable, he promised, in his lifetime, to pay, &c. but it appears in evidence that Eden had been dead near two months before he is said to have made this promise. There can be no necessity for declaring in this way, when it would have comported with the truth, and answered as well as to have stated a notice of non-payment to the defendants, and an assumpsit by them. The only case in any degree resembling this, is that of *Deane v. Crane*, in 6 Mod. 809. An executor had declared on a promise made to his testator above six years before the action brought, on *non assumpsit infra sex annos*; it appeared that the defendant had made a promise to the executors, after the testator's death, but before any action was brought; all the judges agreed, on the case being referred to them, that the evidence did not support the declaration, but that the executor should have declared on a promise made to himself; so neither here does the evidence support the declaration, which should have been on a promise made by the executors. A non-suit must, therefore, be entered in conformity with the agreement of the parties. This renders it unnecessary to say what judgment should be rendered against Martha Eden, because, if another action be brought, she can plead separately, and thus avoid her present embarrassment. The other points have been disposed of to prevent their being brought up again in the next action.

Judgment of nonsuit.

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STEINBACH *against* THE COLUMBIAN INSURANCE COMPANY.

A voyage from one port to another through an intermediate port, where the goods are to be relanded, and shipped to those of their ulterior destination, may be insured as a voyage from the first to the second port, without mentioning the third.(a) Papers referred to by a witness in his depositions, may be produced on a trial to refresh his memory. Copies of papers referred to in depositions may be resorted to in order to their elucidation. After a witness has been examined on interrogatories, and cross-examined, and his depositions read, a new trial will not be granted, on a supplemental affidavit, stating mistake, or surprise. A new trial will not be granted, because of the discovery of new witnesses to the same fact; nor because a juror was challenged in the absence from court of the defendant's counsel. *Quere*, whether on a trial on a policy of insurance, it is not a good challenge to the favor, that one of the jury is an underwriter.

THIS was an action on a policy of insurance, on the ship Catharine, at and from Barcelona to Baltimore. The loss averred to be from arrest and detention by the [*180] Spanish *government, at Barcelona. The depositions of a Mr. Benjamin M. Mumford, examined on the part of the defendants, and cross-examined by the plaintiff, were, on the trial, read by the plaintiff. Their contents led to establish a belief, that the voyage actually intended was direct to the Havanna, or some place in the West Indies. They referred, however, to certain papers and documents, prepared by the deponent at Barcelona, shortly after the seizure of the Catharine, in order to obtain compensation from the Spanish government, and in the captain of all these the voyage was described as for Baltimore, and from thence to the Havanna,(b) in order, as

(a) See *Ely v. Hallett*, ante, 60, n. (a.)

(b) *Murdock v. Potts* was cited. See the observations on that case, 1 Lex Mer. Amer. 320.

stated by the papers, to reship at Baltimore, and avoid, by this circuitous mode, the danger of confiscation for going immediately from one belligerent port to another. These papers were lettered, and at the time of Mumford's examination, shown to him, and he swore he believed them to be true copies of originals, deposited in the archives of the consular office in Barcelona. In order to explain the manner in which the voyage to the Havanna was to be prosecuted, the plaintiff offered these copies, to which the counsel for the defendants objected, that as the depositions were now read by the plaintiff, Mumford was his witness, and these papers being only copies, unauthenticated, and adduced with a view of discrediting his testimony, could not be received. This being overruled, a verdict was brought in for the plaintiff. The present application was, to set it aside, and grant a new trial, on account of the admission of the above testimony, and on account of some other witnesses being since discovered, who could further testify to the facts deposed to. The points made on the argument are fully stated in the opinion of the court, which was delivered by

LIVINGSTON, J. Several objections are made to the plaintiff's right of recovering. 1. It is alleged that the voyage contemplated while the Catharine was at Barcelona, was different from the one insured, and that therefore the risk never commenced. The insurance being *at and from* Barcelona, it may admit of doubt whether, as the loss happened there, the defendants would not be liable, although a voyage from the Havanna were in contemplation. But on this point of law we give no opinion, because it is sufficiently proved that the *vessel [*131] was destined for Baltimore. Thus have the jury found, nor could their verdict have been different, without disregarding all the testimony in the cause. The defendants themselves are aware that this finding comported

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with the evidence, and have accordingly directed their principal attack against the testimony itself; for they say, 2. That Mumford was the plaintiff's witness, and therefore could not be discredited by him. Whether this gentleman be regarded as the witness of the one or the other party, is not very material in deciding this cause; he had been examined out of court, at the instance of the defendants, and cross-examined by the plaintiff, who produced his deposition on the trial. Perhaps the best general rule in such cases, would be to consider the witness, if his deposition be read, as belonging to the party on whose application he was examined, without any regard to the person who may finally make use of it. But without deciding this point, we think nothing was done by the plaintiff to discredit Mumford, even if he had been his witness. It is not every mistake which a witness may make, when speaking from memory, that will discredit him, and it would be a strange rule indeed, that a party producing a witness should not be permitted, even by the witness himself, to correct a mistake which he may have committed. Nothing more was done here; Mumford had sworn, that from certain papers, the destination of the cargo, according to his recollection, appeared to be for the Havana: after this, there could be no impropriety in showing him the papers to which he alluded, or any other to refresh his memory and to enable him to correct his error, if he had made one. This was no imputation on his character; it neither rendered him infamous nor unworthy of credit, as to the other point to which he had deposed; it discovered in the witness a laudable promptitude to rectify a mistake, into which an imperfect recollection had betrayed him, and thus added to, rather than detracted from, the weight of his testimony. 3. The exhibits B. and C. being only copies, should not, it is said, have been produced. If no allusion had been made to these papers, by Mumford, they could not have been produced to show the real object of

this voyage; but he had already testified that he had made out certain claims against the Spanish government, for the Catharine and her cargo, which stated the [*182] vessel to be bound directly for the West Indies: these papers, he added, were lodged in the Consulate office at Barcelona. Having sworn thus far from memory, the plaintiff had a right to refresh his recollection, by showing him copies of the claims referred to: on inspection, he might probably be able to determine whether they were true copies or not, and certainly if he believed them true, they would furnish better evidence of what the originals contained, than any parol account of their contents, which was the only way in which the defendants had attempted to prove them. There is no reason to say, the originals were in the plaintiff's possession. They remained in a public office in Spain: and this kind of inferior proof was rendered proper by the defendants' own conduct. They had not only examined the witness, as to the contents of these papers, but gave the plaintiff every reason to believe that nothing would be required of him but proof that the property was American. 4. The abandonment, it is said, was too late. The Catharine was seized in September, 1800, and not abandoned until fifteen months thereafter. It has already been decided by this court, in *Earl v. Shaw*, that an abandonment may be made at any time after the accident, provided, at the date of the abandonment, the loss still continues total. This being the case here, the abandonment was in season. 5. It is contended that Mr. Mumford was mistaken or surprised on his cross examination, and that, therefore, a new trial should be had. For this purpose, his affidavit is produced, taken nine months after the trial, in which he states that the captions of the exhibits B. and C. were not shown to him, to the best of his knowledge and belief, and endeavors to explain why they were made as they appear, to wit, to prevent endangering the insurance. This explanation comes too late; a witness under examination may explain and correct

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himself, but it will be dangerous and improper to receive any elucidation from him after the trial, and especially after the lapse of so many months: besides, the defendants were apprised of his deposition, long before the trial, and are without excuse for not calling on him then to make such explanations as might be deemed important.

[*188] 6. But *there has been a discovery of new evidence, and for that reason there should be another trial. It is said that if a new trial be granted, there are two witnesses who were not known to the defendants at the time of the trial, who can testify as to the destination of the Catharine. This was the fact principally controverted on the former trial, and we are now applied to for another, merely because all the witnesses who knew something of the matter have not been examined.(a) Every one must perceive the inconvenience and delay which will arise from granting new trials upon the discovery of new testimony, or other witnesses to the *same* fact. It often happens that neither party knows all the persons who may be acquainted with some of the circumstances relating to the point in controversy; if a suggestion, then, of the present kind be listened to, a second, if not a third and a fourth, trial may always be had. There may be many persons yet unknown to the defendants who may be material witnesses in this cause, and this may continue to be the case after a dozen trials. Cases may occur in which, if great doubts exist, as the

(a) It is no ground for the court to grant a new trial, that a witness called to prove a certain fact, was rejected on a supposed ground of incompetency, where another witness who was called, established the same fact, and the defence proceeded on a collateral point on which the verdict turned. *Edwards v. Evans*, 3 East, 451, confirmed in *Smith v. Brush and others*, 8 Johns. Rep. 84, where the court say, "it is against the general rule to grant a new trial, merely for the discovery of cumulative facts and circumstances, relating to the same matter which was principally controverted upon the former trial." Though the fact be new, if it would have no influence in drawing a different conclusion, on a point in evidence, a new trial will equally be refused. *The King v. Tait and others*, 11 East, 811; see *Mahony v. Watson*, 1 Caines' Rep. 25, n. (a)

first decision, it may be proper, on the discovery of further witnesses, even to the same fact, to open the cause for a second discussion; but this is not one of them. The principal fact here was clearly proved, and if Lewis and Byrnes had both been examined, it is very uncertain whether the result would not have been the same. 7. The last reason assigned for a new trial is, that a juror was challenged, in the absence from court of the defendants' counsel, and in consequence of such challenge did not serve. It appears that the defendants' counsel was in court when the trial of the cause was moved for and brought on: if he afterwards left it, it was his own fault. In contemplation of law, he was so far present, during the whole trial, that no motion by the adverse counsel, after he had once appeared, could be regarded as *ex parte*. He had a right to make his challenges to the jurors, without inquiring whether the other counsel was in court or in the hall. On the challenge itself it is unnecessary to decide; it may well be doubted, however, if it were not a good one to the favor: underwriters can hardly be proper jurors, in cases in which persons pursuing the same business are parties. Jurors should be "*omni exceptione majores*." The *judgment of the court is, that the defendants take [*184] nothing by their motion, and that the rule to show cause why there should not be a new trial, be discharged with costs.

New trial denied.

N. B. In another action on the freight of the same vessel, under the same facts, there was a demurrer to the evidence on which the question was raised, whether a demurrer to evidence confesses all the facts which a jury *might* infer? But the court avoided a decision on this point, saying there was enough to warrant the verdict of the jury. Spencer, J, however, declared he considered the demurrer confessed every thing a jury might infer. That he founded his opinion on the case of *Cocksedge and Fanshaw*, in

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Doug. 119, and a similar decision in the Livingston causes, in our own court of errors.

DAY against WILBER, *q. t.*

If a return to a *certiorari* to a justice, state a warrant to have issued in pursuance of the act, and the defendant has appeared and pleaded, it is a waiver of the irregularity, if any, and the court will intend the warrant properly issued. The act to redress disorders by common informers does not apply to proceedings under the 10^l. act. Defects in a warrant are cured by appearing and pleading the general issue. Variance in the declaration from the process is cured by pleading in chief. A warrant may be in the name of an individual, and the declaration *qui tenet* on behalf of himself and others. A first *venue* lost or mislaid is good reason for a justice to issue another. If a defendant requests a second *venue* to be issued when the first is not returned, he cannot assign it for error. A justice may continue his court from day to day. When a return states that the jury heard the proofs and allegations of the parties, the court will intend they were present. If it appear from the record, on a return to a *certiorari*, that the justice did not administer the oath prescribed by law, it is fatal on error, but the justice need not return the form administered. On affidavit of a clerical mistake, a justice's return allowed to be amended after errors assigned, argument and judgment thereon.

IN ERROR, on a *certiorari*, to a justice's court, upon a conviction under the 10^l. act, for selling spirituous liquors without a license. The plaintiff assigned twenty errors, but relied principally on the following: 1st. That there was no endorsement on the warrant, either of the name of the plaintiff, or the title of the statute on which the process was issued; 2^d. That in the process or warrant issued on the plaint, there was no plea mentioned, nor that the defendant owed the plaintiff and the overseers of the poor any money and detained it from them; 3^d. That the plaintiff and defendant being freeholders, the process was by warrant, and not by summons; 4. That the declaration was in the name of the plaintiff and the overseers

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of the poor, when the process was in the name of the plaintiff only; 5. That the justice refused, on a motion made, to quash the proceedings; 6. That before the jury process was returned, another was issued; 7. That the justice opened the court on the 2d day of June, and continued it open till the third before he tried the cause; 8. That the justice swore the constable "to attend the said jury, and to the utmost of his ability to keep that jury together until they had agreed upon their verdict," whereas, by the law of the land, he ought to have sworn the constable to keep them "in some private and convenient *place, without meat or drink, except [*185] water, and not to suffer any one to speak to them, nor to speak to them himself, unless by order of the justice, or to ask them whether they have agreed on their verdict until they have agreed on their verdict."

KENT, Ch. J. I shall consider the causes alleged for error in the order in which they naturally arise. 1. It is alleged that the directions of the act, commonly called the 16th act, have not been observed, as the first process was by warrant, and not by summons. The act directs that the justice, on application under the act, shall issue a summons, or warrant, as the case may require; that the process against freeholders and inhabitants having families, shall be by summons, unless the plaintiff shall prove on oath that he is in danger of losing his demand, or that he believes the defendant will depart the country, or unless the plaintiff be non-resident, &c. The return states, that the plaintiff below prayed process by warrant, and that the justice thereupon, and in pursuance of the act, issued his warrant; that the defendant was brought in on the warrant, and the plaintiff declared, and the defendant joined issue thereon, and prayed an adjournment, which was granted, and on the day to which adjourned, the parties again appeared, and then the defendant objected that the warrant did not issue in conformity to the act regard-

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ting informations. As the defendant, therefore, acquiesced in the process, and never objected to it because it was a warrant, and it being stated to be issued in pursuance of the act, we are to intend it was duly issued, or if not so, the irregularity was waived by the defendant. 2. It is alleged that the suit, being for a penalty given by the 16th section of the tavern act, (1 Rev. Laws, 490,) ought to have followed the directions of the act passed 6th February, 1788, *to redress disorders by common informers*, which requires the name of the plaintiff and the title of the act to be endorsed. Proceedings under the 10L act are to be regulated entirely by that act; and the act relative to common informers does not apply to these proceedings. The terms of it are altogether inapplicable. It supposes a process to be issued by a clerk, and says that the like process shall be awarded as in an action of *trespass at common law*. 3. The warrant is alleged not to state a plea, *or cause of action to which the de- [*136] defendant is to answer, and that it is stated that the defendant is to answer *to the people*, whereas the 10L act says that justices shall not have cognizance of any cause wherein the people are concerned. The defects in the warrant, whatever they may be, are cured by the general plea of the defendant. He has waived all these defects since he pleaded the general issue, and afterwards made no other objection to the warrant than that it did not conform to the act relative to common informers, and which act, as I have already observed, did not, and could not, apply. We have decided, in the cases of Wool and Bevil July term, 1801, and of Young and Canada, January term, 1802, that a defective *venire* was cured, if the party made no objection at the time, but went on to trial; and there is equal, if not stronger reason, why a like conduct should cure a defective process, the only object of which was to bring the party into court. But I consider the process as good. It states the ground of action specifically, and that the plaintiff was the complainant upon

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oath, and that the defendant was to be brought in to answer to the complaint of the plaintiff, and does not allege that he was to answer to the people. 4. It is alleged that the declaration varies in substance from the process. The proper answer to this is, that the defendant, by not pleading that variance, but pleading in chief, has waived it, and so this court has frequently decided in like cases. But it is not true, in fact, that there is any substantial variance. The declarations only unfolds more at large the same charge, which is briefly stated in the process, to wit, the retailing of spirituous liquors without a permit. 5. Another objection is, that the justice overruled the motion to quash the proceedings, or, as the record says, to abate the warrant. The answer to this has already sufficiently been given, since the only reason assigned why it should be abated was, that the process did not conform to the act for regulating informations. 6. It is next objected, that the *venire* is defective; but as the *venire* was issued at the instance, and upon the prayer, of the defendant, it does not lie with him to allege error in it. This point was decided by this court in the case of *Oallinan v. Jilson*, October term, 1801, and it has frequently been so decided in other cases; nor do I *conceive it to have been illegal for the justice to [*137] have issued a fresh *venire*, when the first *venire* had not been carried into effect, but had been *mis-laid, kept, or withheld*, by the defendant himself, to whom it had been delivered. This allegation in the record we are to take for *truth*, and it became indispensable, then, that a new *venire* should issue, or the act of the defendant might have totally defeated the plaintiff's action. It would not have been legal, I apprehend, for the justice to have proceeded to try the cause without a jury, after the prayer of the defendant for one; and it would be most unjust for him to avail himself of his own *laches*, or act, to injure the action of the plaintiff. I am of opinion, therefore, that the issuing of the second *venire* was proper, and that it is to be considered as the process of the defendant below, and that

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no objection to the form of it will now lie with that defendant. 7. Another objection is, that the court was continued over from the 2d of June, when the first venire was returnable, to the 8th of June, when the cause was tried. If the court was opened on the 2nd of June, as we must intend, and the delay created by the defendant in summoning the jury rendered it requisite to keep the court open till the next day, there was no error in that proceeding. It became necessary, and the parties were bound to take notice of it, and attend accordingly. There is nothing in the law to prohibit a justice from continuing his court from one day to the next, when the exigencies of the case require it. If the defendant neglected, or refused, to attend, the justice was authorized to proceed in the trial without him: but we are rather to intend that the parties were present at the trial, for the record states, that the jury did hear the proofs and allegations then and there made and exhibited. However, it is immaterial, in respect to the objection, whether the defendant was, or was not, present. 8. The last error alleged, and which requires notice is, that the constable was not sworn according to law to keep the jury. The act gives a precise form of oath in this case; and the return states that after the jury had heard the proofs and allegations, the constable was sworn to attend them, and to the utmost of his ability to keep them together, in some private and convenient place, [*188] until they had agreed upon their verdict. *The return does not state any further, as to the oath, nor are there any negative words excluding the inference that the whole oath was administered in the form prescribed. As far as the oath is stated it is correct, and in my opinion, we must intend the whole oath was duly administered. This intendment is, in many respects, reasonable; for, in the first place, there was no objection stated at the time, by either party, to the form of the oath; and setting forth the words of the oath was an act of supererogation in the justice, as it formed no part of the record and process

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before him. The form of the oath to the witnesses is equally prescribed by the act, and yet the form is never or rarely set forth in the return to a *certiorari*, nor is it ever required. The record does not set forth the oath stated as given in *hæc verba*. It does not pretend to give the exact form of the one administered. If the oath as far as stated had varied from the act, it might have altered the case; but pursuing it as far as stated, and not being averred to have been *all* the oath that was administered, we are bound to conclude the constable was legally sworn. It has been established by several decisions in this court, that we should liberally intend in favor of the legality of justices' proceedings. Thus in the case of *Wright v. Anthony*, January term, 1802, we said we would intend an issue joined, if the parties went to trial on the merits; and in the case of *Carna v. Penfield*, at the same term, the jury, it appeared, had found 8 cents for the defendant on a plea of payment, and we intended a set-off to help it out. These decisions are in conformity to the intent and spirit of the act, which declares, p 500, that we shall "give judgment according as the very right of the case shall appear, without regarding any imperfection, omission, or defect, in the proceedings in the court below in mere matters of form." I cannot but think that reversing a justice's judgment, because part only of the constable's oath is inserted in the record, would be a decision at once new and rigorous; especially, when none of it need be inserted; when there are no words negating the idea that the whole form was administered; when no objection was taken, at the time, by the parties; when we are bound to overlook all defects of form, and decide on the very right of the case; and when, in many other instances, we have lib- [*139] erally intended in support of their judgments.

THOMPSON, J. concurred in the above opinion in all points.

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LIVINGSTON, SPENCER and TOMPKINS, Js. in all, except as to the constable's oath; on that point they conceived the error fatal, and therefore ordered judgment of reversal.

Judgment reversed.

Gold, the next day, on an affidavit, stating that the manner in which the oath was set forth in the record arose from a clerical error in copying, moved, on the authorities of Cowp. 425,(a) Doug. 134,(b) and 1 H. Black. 238,(c) to amend the return. THE COURT was pleased to ORDER, that the entry of judgment should be stayed until further order, and that the justice have leave till the first day of next term to amend his return, so far as relates to the form of the said oath.

Motion granted.

 BETHUNE AND SMITH *against* NEILSON AND BUNKER.

If an assured be indebted to his broker, and give him a policy to effect an adjustment, which he does, and he thereon *debts* the insurer with the amount, and carries the same to the credit of the assured, it is not payment to him, unless he assent.

THIS was an action to recover the amount of an adjustment on a policy of insurance. The instrument was thus endorsed: "Adjusted a loss of ninety-eight per cent. payable in 30 days, which the brokers are requested to charge to our respective accounts, and cancel this policy.

"New York, 2d January, 1802."

On the trial, one Gordon, the broker who effected the policy, testified that the adjustment was in the usual form. That in New York, the customary mode of transacting business with insurance brokers is as follows: The broker

(a) *Varelet & Smith v. Rafael*.

(b) *The King v. Lyme Regis*.

(c) *Skutt v. Woodward*.

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receives the premium, and is in all cases debtor to the underwriter for its amount, which is considered as due, after three months, when the broker is liable to be called upon by the underwritten for payment of any losses that have happened. These he settles if he has money in hand, (which is generally the case,) but notwithstanding the adjustment, the assured would not be entitled to call upon the broker for the loss until the expiration of the thirty days, nor would the broker consider himself then liable to pay unless he had money of the underwriter's in hand. Between the broker and underwriter the entry of an adjustment

*to the *debit* of the latter, and carried to the credit [*140] of an assured, would, according to the conception of the witness, be conclusive on the insurer; and if the broker, at the time of making the entry has money of the underwriter in hand, the broker would be considered bound to pay at the end of thirty days. But though this is the case, yet if the broker held a note due from the assured, the witness did not imagine the assured could have used the credit given by the adjustment or entry by way of set-off; had it, however, instead of a note, been an agreement in practice, then the witness thought the set-off would be admitted. The brokers receive from the underwriters a commission of five per cent. upon the premiums, and also a commission from the underwritten upon adjustments. But when there have been doubts of the solvency of the broker, there have been frequent instances of the assured's adjusting and collecting the loss due on his own policy. With this routine the plaintiffs were acquainted, as they formerly had been insurance brokers.

It was further in evidence, that the plaintiffs delivered to Munro, the deceased partner of Gordon, the policy in question, for the purpose of procuring an adjustment, which he accomplished on the day, and in the words before set forth. That on the 6th January, Munro & Gordon charged the defendants, and credited the plaintiffs, with the amount of the loss. That at this time, more than the loss thus ad-

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justed was due to Munro & Gordon, by the plaintiffs, who nevertheless were under responsibilities for them. That on the 9th of January, Munro & Gordon failed, and on the 11th, the plaintiffs called on the insolvents for their policy, and afterwards became liable on their responsibilities, and so were at the time of action brought to an amount beyond the sum in question. That the defendants were, at the date of the adjustment, and still are, creditors of the bankrupts for a sum exceeding the amount of the loss. It was further testified by Gordon, that he supposed the plaintiffs informed of the adjustment at the time when made, but did not know that they were acquainted with the entry in the broker's books.

Upon these facts, a verdict was taken for the plaintiffs, for the amount of the adjustment and interest, sub-
[*141] ject to *the opinion of the court, whether it should stand, or judgment be entered for the defendants.

In the case, the following paper was a part, and referred to in argument.

New York, April 20th, 1800.

We the subscribers, underwriters in the city of New York, do agree to abide by, and conform to, the following rules for transacting business with the insurance brokers, from the 1st of May next ensuing.

1. All losses shall be paid in thirty days after a proof thereof is made and presented, of which proof the underwriter shall be the sole judge, so far as concerns the settlement with the broker.

2. The broker who may be indebted to the underwriter, at the time proof of loss is admitted, shall strike the balance due from him, ninety days prior thereto, which balance shall go towards the payment of the loss adjusted, and the residue, or full sum when no account shall exist, shall be paid by the underwriter, in a note at 30 days.

3. The account with the brokers shall be settled and balanced half yearly, viz. on the first day of May, and the

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first day of November; and the underwriter shall have a right to demand the balance due to him, in a note payable in ninety days, subject only to a deduction of two per cent.

4. All balances which shall be left on the first of May, by the underwriters, in the hands of the brokers, shall be applied to the payment of any loss that may afterwards accrue agreeably and consonant to rule 2.

Hamilton, for the plaintiffs. The question is, whether there has been a payment of the loss adjusted. This there cannot have been. The utmost that can be shown is, that the broker made a discount from what the assured owed him. But discount is no payment; and as payment here was, by the words of the adjustment, not to be made till 30 days, it is, perhaps, not consistent with good faith that it should be urged; for prior to that period the broker was not at liberty to pay. Before that time the plaintiffs revoked the authority given to the broker, who is the mutual agent of both parties, and this they might have done according to the usual practice in cases of insolvency. Where a person is a kind of middle man, or an agent in some degree from necessity, his acts [*142] cannot operate to the injury of either party.

By adverting to the subsidiary facts stated in the agreement, made a part of the case, it will appear, that though in fact there might have been a debt due from the broker to the defendants, when the adjustment was settled, still it does not appear to have been such a debt as would constitute money in the broker's hands.

For this purpose, it must have been a balance accrued and struck three months previous to the 2d January, 1802, even then the broker was not bound to pay till 30 days after. The entry in the broker's books was a mere mode of his keeping accounts; for it appears from Gordon's testimony, it did not give the assured any right of set-off against a note in the hands of the brokers. There is no

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case exactly like this in the books, but from Marshall, 203, it appears the English practice is like ours. If there is no superior legal right in the defendants, they ought not to prevail; for though the event must, from the bankruptcy of the brokers, throw a loss on some one, the equity of the plaintiffs is equal to that of the defendants.

Harrison and Pendleton, contra. This question must be decided, not on cases, but on the principles of cases, and will rest on the course of proceedings, and the intention of the parties. The plaintiffs had been insurance brokers, and apprized of the mode of doing business between persons of that description. With this knowledge the policy is put in the hands of Munro & Gordon to adjust and collect. At the time when it was made, the brokers must have had money in their hands belonging to the defendants, on a balance struck according to the agreement, for had it not been on such a balance, due 90 days before, the underwriter, according to the words of the contract with the brokers, would have given his note at 30 days. This shows the brokers were considered as the paymasters of the plaintiffs, for they knew of the adjustment, and, had they looked to the underwriter, would have asked for his note. The assured knew they owed money to the broker, and the transaction bespeaks their consent that the loss should go to their credit. The equity of the parties, it would seem, is not equal; the entry of the *debit* being, accord- [*148] ing *to Gordon, conclusive on the underwriter, and the credit not binding on the underwritten. This looks like a sympathy for the friendly liabilities of the plaintiffs, become certain to be incurred only after the bankruptcy of Munro & Gordon, till when, the policy and adjustment remained quietly in their hands. Though the assured might not have been able to enforce payment till the end of 30 days, yet, as the brokers had money of the defendants in hand, there was nothing to prevent his paying, and the plaintiffs' receiving. The credit passed to the

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insured is a proof of their consent that it should be so; there is no evidence that they did not know it, and the presumption is strong that they did. The delivery of the policy to the brokers was an authority to adjust, and though this authority was revocable at first, it ceased to be so when a third person had acted upon the strength of it, and paid money over as the defendants have done; for they are concluded by the entry in the broker's books. The charge of commissions to each party, evinces the transaction consummated by an actual payment from one man, carried to the credit of another. Even at the end of thirty days after the adjustment, the plaintiffs are not said not to have been indebted to the brokers. Besides, the policy was to be cancelled.

Hamilton, in reply. The general acquaintance with the brokers' mode of doing business, does not affect the plaintiffs with knowledge of this particular transaction. He could not have known there was money in the broker's hands on a balance struck ninety days before. It is not even plain that the adjustment was communicated, still less that the entry to his credit was known, for it was not given till the sixth, whereas the adjustment was on the second, so that notice of the adjustment could not be notice of the crediting. The endorsement only led the assured to imagine himself secure of his money at the end of thirty days. Till then, therefore, the act was not consummated, the policy liable to be taken back, and the power to receive the loss necessarily revoked. The argument from not demanding the note is begging the question, for it supposes a knowledge of the credit given. Till the end of thirty days, the broker had no right over the defendants' funds, and therefore *no appropriation before that period [*144] could legally be made. The entry, therefore, must have been conditional, and before its completion, the policy was withdrawn. Cancelling it was only for the purpose of giving an action on the adjustment. When that is made,

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the old contract on the instrument dies, and a new one arises. Though even then it might be retained for any lien, as that would attach on the adjustment growing out of the insurance.

THOMPSON, J. delivered the opinion of the court. The insurance brokers having become insolvent, and being indebted both to the plaintiffs and defendants, in a sum exceeding the amount now in question, a dead loss must be sustained either by the assured or by the underwriter. Both parties are, therefore, excusable in claiming the benefit of any strict principles of law, applicable to the case, that may operate in their favor. The determination of this question will depend on the relation in which the brokers may be considered as standing towards the respective parties. The agreement between the underwriters and brokers, as to the manner of transacting business, can no way affect the rights of the assured. The underwriters constitute the brokers their agents, to receive premiums; and the brokers agree, at the expiration of three months, to apply such premiums towards the payment of losses for which the underwriters become liable. The underwriters may, therefore, be considered as looking to the brokers for the premiums. There does not, however, appear to be any general agreement, or understanding, between the brokers and assured, that the latter are to look to the former for losses. Every case must, therefore, depend on its own circumstances. As a general rule, the underwriter, and not the broker, must be considered as debtor for the loss. The manner in which the brokers kept their accounts, was conformable to the agreement between them and the underwriters; but this ought not to affect third persons. As between the brokers and the defendants, it may be considered as a payment of the loss by the latter to the former, but not as a payment to the assured, without their assent to such arrangement. No such assent appears—no evidence that the plaintiffs knew of the entry made in the broker's

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books. But had they known it, we suppose it would not affect their claim against the defendants, unless they directly, *or impliedly, assented to look to [*145] the brokers, and not to the underwriters, for the loss. The policy being put into the hands of the brokers, authorized them to make the adjustment, and had it remained in their hands until the expiration of the thirty days, when, according to the terms of the adjustment, the loss was made payable, it might have been considered as an implied authority to receive the money. But the assured took the policy out of the hands of the brokers long before the expiration of the thirty days, and thereby revoked all the authority to, receive payment which they might have been presumed to have had. The defendants cannot be presumed to have intended to make payment until the expiration of the thirty days. This entry was made in the broker's books only four days after the adjustment; and so, cannot reasonably be considered, or imagined, as a payment of this particular demand, but only for the purpose of keeping a general statement of accounts between the brokers and underwriters. We cannot discover any authority given by the plaintiffs to the brokers to receive payment of this loss, or any assent or agreement by the former to look to the latter for payment, and to discharge the underwriters from their liability. The opinion of the court therefore is, that the plaintiffs have judgment.

LIVINGSTON. J. This is an attempt to recover from the underwriters, after a fair settlement, and what I deem equivalent to a payment by the insurance brokers, merely because the latter have since become insolvent.(a) The

(a) It has been ruled that if an insurance broker, living at a distance from his principal, credit him for the amount of a loss on a policy, and receive from him the balance of his account, struck upon the allowance of such credit, the broker cannot, after a lapse of two years, recover from his principal the amount of subscriptions he has, from the subsequent insolvency of the underwriters, been unable to collect. *Jameson v. Skainsstone*, 2 Camp.

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policy was delivered for settlement by the plaintiffs to Munro, one of the brokers who effected it. He thus became their agent, and a receipt of the money by him would have discharged the underwriters. So, also, his other acts in relation to this business must be binding on them. The first thing that Munroe does, is to obtain from the underwriters "an adjustment, payable in thirty days, which the brokers were requested to charge to their account, and to cancel the policy." This was signed by the defendants on the 2d of January 1802. We have no right to believe the plaintiff's ignorant of the nature of this adjustment. Munro is dead, which renders proof of this fact difficult. But from their having been brokers themselves, and from the relation in which they stood to Munro in the transaction, it is a fair and natural *presumption, that [*146] they knew of this adjustment immediately. This knowledge would amount to but little short of a consent on their part to take the brokers as paymasters, if they were in funds, and willing to become so. It is admitted this was the case; for, only four days after, the brokers charged the defendants, who were their creditors, and credited the plaintiffs, who were their debtors, in their books, with the amount of this loss. This anticipation of payment might have been at the broker's peril, but the plaintiffs had no right to complain. With this entry it is not certain the plaintiffs were acquainted, but being indebted to the brokers, they could not well object to it; and it is more than probable they were informed of it by the one who is since dead. I have chosen to consider this case without reference to any general agreement between brokers and underwriters, because I think there is sufficient evidence that the plaintiffs agreed to look to the broker, with-

546, n. So, if the broker himself pay the loss. *Edgar v. Dunstead*, 1 Camp. 411. Where a broker retains a policy in his hands, he is bound to use reasonable diligence in procuring payment from the underwriters; if he do not, he is liable, in case of their insolvency. *Bousfield v. Creswell*, 2 Camp. 545.

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out any future recourse on the underwriters, and because having received payment by a credit with the brokers, whose debtors they were, it would be unjust to subject the defendants to any inconvenience on account of the subsequent bankruptcy of those gentlemen. I think, therefore, there should be judgment for the defendants.

Judgment for the plaintiffs.

JACKSON, on the demise of ZIMMERMAN, against ZIMMERMAN and others.

If a testator devise a specific quantity of land, out of a larger tract, and then describe the courses and distances to be run, if, by stopping at one of the lines mentioned, the devise will fall short, it will be held that the line was mentioned under the supposition that it would include the quantity devised, and the devisee will be entitled to have it run out that length. The erecting a fence, and showing it as a boundary, does not conclude the person so doing, if at the time such declarations are made that he is entitled to more.

THIS was a case submitted without argument. The lessor's father gave him, by will, sixty acres of land, being part of a larger lot, and then described the tract devised, by certain courses and distances, one of the last of which was south six degrees, east six chains, or thereabouts. If this last line was to be only six chains, the lessor would not have sixty acres, but, by extending it a few chains, he would have that quantity. Whether this line ought to be so extended, as with the other courses to include sixty acres, was the question.

LIVINGSTON, J. delivered the opinion of the court. It is evidently the testator's intention to give his eldest son, the lessor of the plaintiff, exactly sixty acres of the lot from which they are to be taken; and he, no doubt,

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[*147] supposed that the courses *and distances given would have included that quantity ; but he seems at the same time to have been aware that it might not be the case, and for that reason, probably, makes use of the expression, so many chains, or thereabouts. It is the same as if he had first described the courses and distances, and then said, that this line should be six chains, or so long as to include, with the other courses and distances, sixty acres. In this way, full effect is given to the devisors intentions, without violating any rules for the construction of grants. But it is said by the defendant that the lessor, if he ever had a title, has destroyed it by his own acts ; which are, his showing a certain line as the division line between himself and the defendants, and erecting a fence thereon, and this fence he showed to three witnesses, but to two of them he declared "that by the will, he ought to have more land." This conduct of the lessor cannot be regarded as a relinquishment of his rights, which, so far from being waived, are constantly asserted by him : although he might for the present be satisfied with the line on which the fence was placed, he would not in this way be deprived of lands, to which he might show a title, beyond that line ; or even if, under a misconception of his rights, he had considered this line as his boundary, it did not prevent his extending it according to the intent of the testator, whenever he should think proper. We are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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BELDING *against* PITKIN, executrix of PITKIN.

An action will not lie upon a contract to pay over half the proceeds of an illegal contract, though the money arising from it has been received by the defendant.(a)

THIS was an action of assumpsit, tried before the Chief Justice, at the Columbia circuit, in July, 1863. The declaration contained the common money counts, and a count for work, labor and services, under which it was agreed that the plaintiff might offer evidence of a special contract. The defendant's testator was possessed of a grant from the

(a) That an unlawful transaction should ever, in any way, become the legal basis of an action at law; or, in other words, that the law should ever, in any manner, lend its aid to enforce claims arising out of a violation of its own principles, strikes the mind, on being barely stated, as repugnant to all reason and good order. The judges in Westminster Hall seem, however, to have been in some degree astute in supporting actions originating in illegal transactions. Thus, it has been said that where the illegal contract is executory, money paid upon it may be recovered back, *aliter*, if it be executed; (Per Buller, J., in *Lowry v. Bortles*, Doug. 470; *Tappenden v. Randall*, 2. Bos. & Pull. 467;) and that where the contract is only *malum prohibitum*, and not *malum in se*, if a third party lend money to pay a loss incurred in its performance, the loan, though with notice, is a good consideration to support an action. *Faulkney v. Reynolds*, 4 Burr. 2069; *Petrie v. Hanney*, 4 D. & K. 418. These cases are, perhaps, very questionable. They were disapproved of by Lord Thurlow; and in *Ex parte Mather*, 3 Ves. jun. 373, Lord Loughborough says, what is called in them a consent, "is a confederacy to break a positive law." This idea of his lordship is in unison with the cases under the statute prohibiting the sale of public offices; (5 & 6 Edw. VI. c. 16;) for, though it be a penal law, and, according to the rule of our jurisprudence, not to be extended as to penalties and punishments, "yet, if there be a public mischief, and a court of equity" (why not a court of law also?) "sees private contracts made to elude laws enacted for the public good, it ought to interfere." On this principle of Lord Talbot's, in *Law v. Law*, Forrest, 141, it has been determined that an action at common law cannot be maintained on an agreement to allow the plaintiff a certain share in the profits of an office, in which he superannuated himself to get the defendant appointed. *Garforth v. Fearon*, 1 H. Bl. 327.

Independently of the inferences to be drawn from the last determination, the diversity sanctioned by the cases of *Faulkney v. Reynolds*, and *Petrie v.*

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Susquehannah commissioners, so called, for a township of land in the county of Luzerne, and commonwealth of Pennsylvania, under the Connecticut title only. He contracted with the plaintiff, that if he would sell this for him, he would give for so selling the same, the one half of

Hannay, have received a very severe shock by the decisions in *Stears v. Lashley*, 6 D. & E. 61, and *Aubert v. Maze*, 2 Bos. & Pull. 371; the former having settled that a bill drawn by an agent, in illegal transactions, on his principal, for the amount of money paid on his account in settling those transactions, cannot be recovered on by a third person taking it with knowledge of the consideration; and the latter, that money paid by an associate in a prohibited trade, on account of losses sustained in it, cannot be recovered from the other, even under an award made by the arbitrator, to whom the settlement of that balance, and other things, were referred.

In order to take an action out of the baneful effect of an illegal consideration, the English adjudications have made this further distinction, that when the suit is against a third person, who has received money under an unlawful agreement between two others, it shall not lie with him to set up its illegality; *Farmer v. Russell*, 1 Bos. & Pull. 296;) therefore, an insurance broker, who has received upon an illegal policy the amount of the loss, cannot make the vice of the contract his defence. *Tenant v. Elliot*, 1 Bos. & Pull. 8. Lord Kenyon, however, in *Sullivan v. Graves*, Park, 8, and 1 Selw. N. P. 57, determined that in an action by a partner in illegal insurances who had paid the whole of the losses, against a broker who had received on the plaintiff's account half the amount from the other partner, the defendant might avail himself of the unlawfulness of the transaction, and that the plaintiff could not recover. Yet, where money was deposited in the hands of the defendant, as a stakeholder upon a wager, the subject matter of which was illegal, and notice given not to pay it over to the winner, it has been allowed to be recovered by the party who made the deposits. *Ootton v. Thurland*, 5 D. & E. 405; *Lacauseade v. White*, 7 D. & E., as explained in 8 D. & E. 575. But after a party to a wager against law has lost his bet, and the stakeholder has paid it over, either by the direction or assent of the plaintiff who staked the money, he cannot recover it even from the winner. *Hewson v. Hancock*, 8 D. & E. 575. So, if property be left in the hands of a party to an illegal bet, to become his if he win it, an action for its value cannot be maintained against him, after the bet is lost. *M' Cullem v. Gourloy*, 8 Johns. Rep. 148. Yet, such winner will not be allowed to recover against a stakeholder of an illegal bet, even upon his accountable receipt, though notice not to pay over do not appear to have been given; (*Bunn v. Riker*, 4 Johns. Rep. 426;) and Hoffman, Recorder of New York, has ruled, that although a stakeholder pay over to the winner of an illegal bet, in violation of the notice not so to do, an action cannot be maintained against him

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*all that should be obtained over and above one [*148] thousand dollars. The plaintiff did sell the townships to one Anthony Maxwell, and took his notes for two thousand five hundred dollars, about one thousand seven hundred and fifty dollars of which had been paid to the testator. The residue was not paid by Maxwell to any person. A verdict for six hundred dollars was taken by consent, subject to the opinion of the court upon this question: whether any action could be maintained to recover the moiety of the profits arising from the sale of lands under the Connecticut title, those lands being situated in, and claimed by, the commonwealth of Pennsylvania?

Williams, for the defendant. The transaction was illegal, because the title was not an object of legal sale. It was a pretended title. The action is for a compensation for doing an unlawful act; for in the *Susquehannah* causes it was settled, that sales of these titles were void.[1]

by the person making the deposit. *Bushman v. Cushman*, 1 Esp. Dig. part 1, Amer. edit. by Gould, 25.

Where a statute is made to protect a particular class of persons by avoiding the contracts they enter into with others, as the English statutes against lottery insurances and usury, for the premiums paid in the one case, and the excess of interest in the other, an action may be maintained; (*Jacques v. Golightly*, 2 Bl. Rep. 1073; *Jacques v. Witty*, 1 H. Bl. 65; *Rosanquet v. Dashwood*, Cas. temp. Talb. 38;) *aliter*, where the parties are *in pari delicto*, by each being of that class against whom the statute is directed. *Clark v. Shea*, Cowp. 197; *Browning v. Morris*, Cowp. 790.

The principle of the decision in the text has been acknowledged in *Barnard v. Oram*, 1 Tyler, 467. See also *Moybin v. Coulson*, 4 Dall. 298; *Hanney v. Bees*, 3 Cranch, 242; 2 Fonb. 6. n. (c).

Amidst this multiplicity of decisions, not altogether consistent, those of Hoffman and Lord Kenyon seem most consonant to the purity of law. It might, perhaps, have been well if the courts had laid down the broad rule, that for money due, paid, lent, or received, on an illegal contract, or for any other claim arising out of one, by or against parties, privies, or any third persons, a suit cannot be maintained either at law or equity.

[1] As to illegal contracts, &c., see Story on Contracts, p. 105, § 165, and cases cited.

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W. Van Ness, contra. The parties have consented to the whole of the transaction, and have actually received money under the contract. To whom the title belongs is immaterial. Though the contract might have been void, yet, as it was not *malum in se*, but only a *malum prohibitum*, and has been consummated, the money due to the plaintiff out of the consideration actually paid may be recovered. This is different from the case of enforcing a contract.

Williams, in reply. Common law provisions declare the contract null. Though consummated, it will not interfere: but the present suit is, in fact, to enforce the contract, and make us pay under it, though contrary to law. The principle is, that courts of justice, in cases like the present, will not aid either party, but leave them where they are. 1 Pow. on Cont. 176.

THOMPSON, J. delivered the opinion of the court. We think the plaintiff's demand cannot be supported. Although the case is somewhat obscurely drawn, we assume, as facts admitted, that the claim possessed by the testator, Pitkin, to the township of land in Luzerne county, in Pennsylvania, was nothing more than what is usually called the Connecticut claim, and that there was an adverse possession under the Pennsylvania title, at the time of the sale made to Maxwell. In this we are warranted, because [*149] the counsel on the argument *have so considered the case. Under this statement, the sale to Maxwell was illegal, and would fall under the denomination of maintenance. This court have gone the length of saying they will judicially recognize the situation of that county, and will not enforce contracts relative to the sale of the Connecticut claim. If the sale by Pitkin would have been illegal, we are unable to discover how it could be legalized by his agent, or broker. It is too salutary and well settled a principle to be in any measure infringed, that courts of justice ought not to assist an illegal transaction in any

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respect. To sustain the present action, would be in some degree ratifying, countenancing and sanctioning an illegal contract. It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful. Whenever the consideration, which is the ground of the promise, or the promise, which is the effect, or consequence, of the consideration, is unlawful, the whole contract is void. In the present case, the object and consequence of the agreement was the sale of the pretended title. This being illegal the promise to divide the spoil was of course illegal, and not to be enforced. All contracts that have a fraudulent object in view, are void, both at law and in equity. It is also laid down by Powell, in his Treatise on Contracts, as an established principle, that all contracts are void that are of an unfair nature in respect to their influence on third persons, although otherwise as between the parties to them; because if their object be to impose on third persons, the parties to them cannot have remedy at law, or in equity, for they are immoral. If the consideration money for this pretended claim had been paid to the plaintiff, neither a court of law, or equity, would have aided the defendant in recovering it from him. This is, therefore, a case to which the maxim *melior est conditio possidentis* must be applied, and judgment as in case of nonsuit entered.

LIVINGSTON, J. I cannot concur in the judgment which has been just delivered: there is no difference among us as to the general rule; but, in my opinion, the facts here are not such as to call for its application to this case. The defence is of the most unconscientious nature. The defendant admits he has received a large sum for the plaintiff, *but refuses to refund, because the contract on [*150] which it was paid, although for his benefit, and made at his instance, was illegal: the maxim of "*melior est conditio possidentis*" is too well settled to be now shaken, although it may well be doubted, whether it was originally intended to apply to any other cases than where the party

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in possession was regarded as owner of the property, until a better title were shown in another. Thus far the rule is salutary, inasmuch, as it gives to possession a proper value and will not permit its being lightly disturbed: but it has certainly been extended to other cases, and if the contract which forms the basis of this demand be illegal, or if the plaintiff assisted in imposing on a third person, perhaps he ought not to recover. But from nothing in this case can it be inferred that this contract was illegal, or that any fraud has been practised on Maxwell; it is altogether silent as to the laws of Pennsylvania, where the land lies; and, were it otherwise, it might be a question, how far, in this action, we could take notice of them, to render invalid the contract between these parties. For aught, therefore, that appears, nothing has been done contrary to the laws of that commonwealth, nor has Maxwell been imposed on. He may at the time have been in possession of the lands under Pennsylvania, and have purchased the Connecticut claim, as was lawful for him to do, to quiet his title, or he may now hold the land under Pitkin.[1] In either case, he has received value for the money he paid, and cannot be viewed as an injured person. This presumption is confirmed, by the circumstance of his having paid so large a proportion of the notes which he gave. It not appearing, then, that the contract between Pitkin and Maxwell is illegal, nor that the latter has been deceived, or defrauded, and the defence being of a kind not entitled to much countenance, I think the plaintiff should have judgment.

Judgment of nonsuit.

[1] See *Jackson v. Tidd*, p. 187, *post*.

Stewart v. Eden.

R. AND H. STEWART *against* EDEN.

Taking a note out of the bank, where it has been lodged for collection, is a sufficient consideration to support assumpsit against a third person, though the note be afterwards protested for non-payment. A note given as a collateral security for a judgment recovered, cannot be impeached on account of usury in the suit on which the judgment was obtained.

ASSUMPSIT on a special agreement to pay a promissory note drawn by John Pelletreau, in favor of John Wardell, and by him endorsed to the plaintiffs. The note, on the promise to pay which the action was founded, had been *given as collateral security, for payment of [*151]. an unsatisfied judgment, obtained on a note for a larger amount, of which the plaintiffs were *bona fide* holders made to Charles Brigden, on a usurious consideration. The note thus given, and on the promise to pay which the present action was founded, had been lodged in the bank for collection. On the day it fell due, the defendant wrote to the plaintiffs, "that if they thought proper to oblige him by withdrawing the note from the bank, he would hold himself responsible to them to settle it in some satisfactory way, by the Wednesday following; but, as the note was lent to him, or for his use, unless it was withdrawn, he could not consider himself liable for its payment." In consequence of this letter, the plaintiffs did withdraw the note from the bank, made a due demand on the maker, gave regular notice of non-payment to the endorser, who had become a bankrupt, and also informed the defendant that they had withdrawn the note from the bank, pursuant to his request, and looked to him for payment. On these facts, a case was made for the opinion of the court.

Woods, for the defendant. I make three points: 1. That the promise was without consideration; 2. That the plaintiffs did not comply with the request on which it was

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founded; 8. That the usury in the first note, on which the judgment was obtained, affected and destroyed the second, so that a promise to pay, founded on such a basis, was void. The two first objections speak for themselves: it could never have been intended that the note was to have been merely withdrawn, and then protested. On the third, the case of *Walton and Shelly* is decisive.(a)

Riker, contra. The withdrawing the note from the bank, on account of preserving the credit of the parties, was all that was asked. It was not required to exonerate the endorser. Forbearance is a good consideration. *Mopes v. Sir Isaac Sidney*, Cro. Jac. 688; Cro. Car. 241.(b) Wherever there is a moral obligation to pay, it is sufficient for an assumpsit. *Hawes et Ux v. Sounders*, Cowp. 294, per Lord Mansfield. As to the usury, it is settled that though a usurious note be void in the hands of a *bona fide* [*152] holder, yet, a new security given to such a person, for the usurious note, is good. *Cuthbert v. Haley*, 8 D. & E. 390.

Woods, in reply. If the original consideration is bad, a new security cannot make it good. A void consideration cannot be confirmed: the first note was void, nothing, therefore, can set it up.

KENT, Ch. J. delivered the opinion of the court. We are satisfied there is no ground for the last objection, arising out of the original usury. The cases of *Ellis v. Warnes*, and *Cuthbert v. Haley*, are decisive authorities for the plaintiffs. The only questions are, whether here was a sufficient

(a) 1 D. & E. 269. A bond given for the amount of certain notes: held, that in an action on the bond, an endorser on those notes could not be called to prove they were given on a usurious consideration.

(b) *Cooks v. Douse*, a promise to forbear for a little time, held good: but in *Tolson v. Clerk*, a promise to forbear for some time, ruled to be no consideration, no more than for a little time. *Ibid.* 433.

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consideration for the promise, and whether the plaintiffs did withdraw the note agreeably to the intent, and according to the condition, of the promise. It is stated in the defendant's letter to the plaintiffs, that the note was lent to him, or for his use. By this, I understand him to say, that he was exclusively benefited by the money or credit raised by the original note, for to secure the payment of which the one in question was given. He was, therefore, the *cestui que trust*, the *real debtor* who stood behind the parties to the transaction in their responsibility to the plaintiffs. He was bound to indemnify them for the sum the plaintiffs should recover; and if, instead of paymer through the medium of a third person, he came forward to assume directly the debt to the plaintiffs, he did no more than what he was under an equitable obligation to do. This is the only true and intelligible construction of the language in his letter, and the moral obligation he was under was a sufficient consideration for his promise. The condition that he annexed to his promise was literally complied with. The note was withdrawn from the bank; and that is all that was requisite to bind him, considering he was under the equitable obligation I have stated. We are not to look for the consideration of the promise, from the act of withdrawing the note. That perhaps, would not alone have created one, though considering the course of business and credit at the bank, the dishonor of a note, placed under the agency of the bank for collection, was a matter of real and serious consequence to the credit of the party, and much more so than if it had happened without the purview of the bank. *We think it, [*158] however, sufficient for us to look only to the literal fulfilment of the condition annexed to the promise, since we perceive a valid consideration for the assumption without reference to that condition. We are of opinion, therefore, that the plaintiffs are entitled to recover.[1]

Judgment for the plaintiffs.

[1] In a suit on a bond to indemnify the obligee for his liability as maker
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Coulon v. Green.

P. COULON *against* GREEN AND LOVETT.

If the agent of an insured give his own note with an endorser for the amount of the premium on a policy, and the assured pay to the agent the amount, deducting one per cent. per month for the time it has to run, and after this assign the policy, the assignee, after settling a total loss with the insurer, and paying the amount of the note thereout, cannot maintain an action on the money counts against the endorser, nor is the note impeachable on the score of usury.(a)[1.]

THIS was an action of assumpsit on the usual money counts.

A verdict was taken for the plaintiff, subject to the opinion of the court, on the following facts:

Joseph Coulon, being owner of goods shipped on board the ship *Little Martha*, on a voyage from Charleston to St. Sebastini, made application to Ralph B. Forbes, his agent at New York, to effect insurance thereon. The terms being agreed on, Joseph Coulon, without the knowledge of the defendants, paid to Forbes the amount of the premium, deducting therefrom at the rate of one per cent. per month for the time of credit given by the insurer for the premium, and the insurance was accordingly effected by Forbes, who,

of a promissory note held by a third person, and to pay off such note, the defendant cannot set up usury in the note. *Churchill v. Hunt*, 3 Denio, 321. Where a usurious note had been transferred for a valuable consideration, and a new note given to an insolvent holder, held not to be void. *Kent v. Walton*, 7 Wen. 256. A judgment in the hands of a *bona fide* assignee is not affected by usury between the original parties. *Wardell v. Eden*, 2 J. C. 258; S. C. 1 J. R. 531, note.

(a) To create usury, there must be a loan and forbearance. The per centage taken in the text was not for forbearing, but for making an anticipated payment. Therefore, taking fifteen per cent for paying an acceptance before due, is not usury. *Barclay v. Walmsley*, 4 East, 56.

[1] Three things are necessary to create usury: a loan, taking more than lawful interest, a corrupt agreement. *Bank of Utica v. Wager*, 2 Cow. 712; *Bank of Utica v. Smalley*, 2 Cow. 770. See the cases as to what constitutes usury in New York Digest, vol. 4, p. 1333, *et seq.*

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instead of paying the premium in cash, gave his note for the amount, dated 6th October, 1800, payable nine months after date, and endorsed by the defendants in these words: "Pay the Manhattan Company for the Columbian Insurance Company." This endorsement was made for the accommodation of Forbes gratuitously, and with a knowledge in the defendants of the use intended to be made of the note, in securing the premium, and also without any knowledge on the part of the plaintiff. The policy was afterwards assigned by Joseph Coulon to the plaintiff. A loss of the goods insured happened, but the payment of it being contested, a suit was instituted, pending which the note became payable, was protested for non-payment, and due notice given to the defendants. Forbes was discharged under the bankrupt law.

The policy contained the usual clause, that in case of loss, the amount of the note for the premium, if unpaid, should be first deducted. The insurer agreed to pay the loss, but retained the amount of the premium, and paid *to the plaintiff the balance. The attor- [*154] ney for the plaintiff then gave the insurers a receipt in these words: "Received, 1st April, 1802, of the Columbian Insurance Company, 19,600 dollars, in full, for a total loss on 20,000 dollars, cargo, &c., and I consent that the policy be cancelled." The note given for the premium was then delivered by the insurers to the plaintiff, with this receipt: "Received of the plaintiff, assignee of Joseph Coulon, being deducted from loss of cargo," &c.

The insurers refusing to endorse the note to the plaintiff, the suit was brought to recover of the defendants the amount of the note.

KENT, Ch. J. delivered the opinion of the court. The plaintiff sues on the ground of being assignee of Joseph Coulon's policy, and we are therefore to consider the case as if Joseph Coulon was the plaintiff. If Joseph Coulon had made no payment to Forbes, there would then be no

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difficulty in the case, as the deduction made to the company of the premium, would have been what Joseph Coulon was bound to do, for the premium was his proper debt. We do not think that the payment of Joseph Coulon to Forbes ought to alter the case, it being without the privity or knowledge of the defendants. All that the defendants intended to respond for, and all that in equity they ought to be answerable for, was the premium due the insurers; and they, knowing the object of the note, were presumed to know that in case of loss, the fund coming to Joseph Coulon would, in the first instance, be liable for that premium. Here was with them a fair calculation of eventual safety in one event, and, under that calculation, they endorse to accommodate the agent of Joseph. They ought not, then, in justice, to be put in a worse situation by an arrangement between Forbes and Coulon, to which they were strangers. As, therefore, the suit is not upon the note, in which as endorsers they might have been held to strict legal obligation by their endorsement, and in which the technical rules of law would have prevailed, but as they are sued in a form of action in which the broad equity of the transaction is unfolded, we are of opinion they ought not to be liable. We put out of view the payment of

Joseph Coulon to Forbes, and consider the deduction [*155] of the premium as a payment by Forbes of his proper debt, and which was a just satisfaction of the note.[1]

Postea to the defendants.

[1] See *Key v. Hall*, p. 59, note, and cases cited; and see *N. Y. Dig.* vol. 3, p. 141.

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VANDERVOORT and another against P. N. SMITH, President of the Columbian Insurance Company.

Where a policy is clear, certain, and unambiguous as to the voyage insured, propositions asking the rate of insurance for another voyage cannot be resorted to as representations to show the voyage insured was meant to be restricted to that described in the proposition. An application for a new trial on account of a discovery of testimony must show it to have been discovered since the trial. It is not sufficient to say it has been received since, for its not having been received might be urged as a reason for not trying. A copy of proceedings in a foreign tribunal, certified under the seal at arms of a foreign minister of the kingdom in which the tribunal exists, is not even *prima facie* evidence, unless it be made appear such minister has the official custody of such proceedings. All transactions from foreign languages must be on oath; one by a consul is of no more validity than by any other respectable person. Admissions in a case are conclusive against the party making them.

ASSUMPSIT on a policy of insurance, at a premium of 27 1-2 per cent. on the cargo of the schooner *Four sisters*, "at and from New York to two ports on the coast of Brazil." The printed warranty respecting illicit trade was obliterated, but at the foot of the instrument the following clause was written: "It is warranted, that the said vessel shall have no contraband goods on board, that the assurers take all risks of seizure, for, or on account of, any illicit or prohibited trade, except risk of seizure in port, for or on account of, any illicit or prohibited trade." The plaintiffs claimed a total loss, averring it to be in consequence of seizure off the mouth of the river Para, by armed vessels belonging to subjects of Portugal.

At the trial, the subscription, interest, loss, due abandonment, and seizure by the Portuguese, at sea, off the mouth of the river Amazon, were admitted. It appeared that the voyage pursued had been from Rio Janeiro, on the coast of Brazil, to Para, on the same coast, but about two thousand miles north of Janeiro. The testimony of John Blagge (who was the projector of the expedition) evinced,

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that its object was to go to Rio Janeiro, and from thence to another port called St. Catharine's, not more than a few hours' sail distant from the former. But this, he deposed, was not, to his knowledge, ever communicated to the defendant; who, however, on his part, wished to prove that it was, and constituted a material representation, on which the policy was effected. For this purpose he showed that the practice of the Columbian Insurance Company was to oblige the underwritten, on all occasions, to commit to paper their applications for insurance, to which written answers were returned. That, in the present case, the following communications passed between the parties: 1. "What will the premium be on — dollars, cargo, to be shipped on board a good and fast sailing schooner, with an [*156] experienced *captain, at and from this to two ports on the coast of Brazil, (to clear for the Falkland Isles) at and from thence back again, and what will be the outward premium only, the insurance to be against all risks? New York, 6th December, 1801. M. L. Vandervoort & Co." Answer. "Thirty-three and a half per cent. out and home; seventeen and a half per cent. out only." 2. "N. B. One of the ports is where the vessel calls for her return cargo, and is about four or five hours sail from the other. The schooner is the Four Sisters, Captain Barker." Answer. "Twenty-seven and a half per cent. out and home; fifteen per cent. out only." 3. "Seizure in port excepted. Warranted no contraband on board. The office take all risks of seizure, for, or on account of, any illicit or prohibited trade, seizure in port excepted, for, or on account of, any illicit or prohibited trade, 15,000 dollars wanted. The New York office have taken 25,000 dollars at twenty seven and a half, at the above clause. The clause in the policy respecting illicit trade, in articles contraband of war, erased before signing, warranted to have no contraband goods on board, the assurers to take all risks of seizure, for, or on account of, any illicit or prohibited trade, except the risk of seizure in port, for, or on

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account of, any illicit or prohibited trade." Answer. "Twenty seven and a half per cent. under the warranty last mentioned." The defendant established, by several witnesses, that the difference of premium between a voyage to Rio Janeiro and another port within four or five hours' sail, and a voyage to Rio Janeiro and Para, would be from five to six per cent. To the admission, however, of these written applications and answers, the counsel for the plaintiffs objected, as tending to explain away, by parol testimony, a contract reduced to writing; and the judge directed the jury, that the paper writings above mentioned (which, it appeared, had been in some measure reduced to form since effecting the policy) could not be considered as representations, or any part of the contract, but only suggestions, or propositions, leading to a contract, and therefore to be wholly laid out of view, except for the purpose of showing positive and actual fraud. Upon this charge, a verdict was rendered in favor of the plaintiffs, for a total loss.

The defendant now moved to set this verdict *aside, and grant a new trial, on account of the mis- [*157] direction of the judge, because the various paper writings were representations containing material facts which had not been complied with; 2. Because the vessel was actually seized in port; 3. Because the warranty against contraband goods had not been fulfilled; and, lastly, on account of newly discovered evidence.

Bogert, for the defendant. The various propositions, as they have been termed, were, as we contend, representations of the voyage to be insured. This voyage constituted the basis of our engagement. That performed was a different one. A representation is defined "a collateral statement of facts, on which the "policy is to be effected, and may be by parol, or writing." 1 Marsh. 184, 185, 187. It forms no part of the policy, but makes a part of the contract. If a material fact be omitted, the policy is avoided. *McDowal v. Frazer*, Marsh. 388. The destination to Para was ma-

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terial, because it increased the risk, as is manifest from the difference of premium stated in the case. This, it is settled, is a conclusive circumstance to show the representation material. *Purson v. Watson*, and *Bize v. Fletcher*, Doug. 12, Park, 204. It is true, after a representation the assured may change his intention, but then such change forms a new representation, which must be communicated, otherwise the original intention is presumed to continue, nay, must be pursued. *Millar*, 392, 401, 482. In the case before the court, the voyage described is not contradicted by the policy, and the representation ought to have been referred to, for the purpose of showing it had not been complied with. On the second point, though an admission be made at a trial, yet, if subsequent facts show that it was a mistake, it would be too rigid to tie the party down to his admission. It appears from the proceedings at Para, certified under the seal of the Portuguese minister, received since the trial, that the seizure was for illicit trade, and in the mouth of the river Amazon. This may be held to be in the port of Para, because of the trading which is carried on from the place where the seizure was made. The distance to which a port extends, is no reason for denying it the legal [*158] attributes of a port. *Hargrave's Tracts*, 46. *And though the seizure was not for contraband, or illicit trade, yet, as the condemnation proceeded on that ground, it is sufficient to prevent a recovery. For, though there be no cause of seizure when a vessel is first seized, yet if any be afterwards discovered, she may be proceeded against on that.

Harison and Hamilton, contra. It was proved on the trial that the propositions had been filled up in some points after the policy was underwritten. The practice, therefore, of the company is not entitled to much respect. The question is whether this thing, which is called a representation, is to control the natural import of the words of a policy? By them the assured has it in his power to go to any two

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ports at his option. For he that is to do the first act, to determine the object, has invariably a right to elect. Co. Litt. 145. a. If so, and a clear explicit meaning appear on the face of the instrument, the settled rule is, that no parol testimony, or evidence, *alunde*, can be admitted to explain, contradict, control, or extend it. The general authorities to this point are, *Gunnis v. Erhart*, (a) 1 H. Bl. 289. *Mease v. Ansell*, (b) 8 Wils. 275. Bull. N. P. 296, 297. *Mease v. Mease*, Cowp. 47. (c) *Henkle v. Royal Ec. Ass. Co.*, 1 Ven. 817. *Hare v. Sherwood*, 8 Bro. Ch. Cas. 168. (d) In *Loufeld v. Stoneham*, 2 Stra. 1261, a devise was to "John Stoneham, and in case of his death, to his wife Susannah." The devisee outlived the testator, and the defendant, his widow, offered parol evidence to show that the testator, when *in extremis*, declared he meant the husband should have only the interest, and that the principal, after his death, should go to her if she survived him. But the Chief Justice instantly overruled it. Where the law raises a collateral equity, this may be rebutted by parol testimony. But wherever a legal effect is fully established by the words used, such evidence cannot be received. *Preston v. Mercere*, (e) 2 Bl. 1249. So in *Rich v. Jackson*, (g) [1] 4 Bro. Ch. Cas. 514. But where it is resorted to merely to show the consideration of a deed, there it will be received. *Filmer v. Gott*, 7 Bro. Parl. Cas. 70. *Rea v. Scammonden*,

(a) That the verbal declarations of an auctioneer, at the time of sale, shall not be received in evidence against his printed proposals.

(b) An agreement in writing to exchange a copper mill, for the yearly grass in Whiteacre, parol evidence to show it was for the grass in Whiteacre and Blackacre refused.

(c) Agreement that an absolute bond was given as an indemnity, not to be received in evidence.

(d) Parol evidence to prove an annuity was intended to be irredeemable, refused, no such covenant being in the deed.

(e) Parol testimony not admissible to prove an additional rent payable by a tenant beyond that expressed in the deed.

(g) Parol evidence not admissible to prove conversations before and at the time of sealing a lease varying its effect.

[1] See New York Digest, (Title, Evidence,) vol. 2, ch. 12, p. 229.

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8 D. & E. 474. But the writings attempted to be referred to as representations cannot be received. They are mere propositions absorbed in the contract. 5 Vin. Abr. [*159] tit. "Contract," let. G. *pl. 26. "Where a contract is reduced into writing, all previous contracts are resolved into that." Therefore, the definitive agreement, the policy, is to be the only guide. In that there is no ambiguity, either latent, or patent; and consequently, no pretext for recourse to extrinsic testimony. It is only to evince fraud that a representation can be resorted to. The new testimony, on which the arguments rest as to non-compliance with the warranty, and seizure in port, is nothing more than a copy from the office of the Portuguese minister, of a copy of the proceedings from Para, and amounts to nothing. The definition of a port, in the treatise of Lord Hale, *de portibus maris*, from Hargrave's Tracts, is applicable to English ports, which take their rise from particular grants and customs, but not to the mouth of the river Amazon.

Pendleton, Hoffman and Gaines, in reply. We admit the general rule as to the admissibility of parol testimony, against the words of a written contract. It does not, however, apply here: for the evidence adduced at the trial, and which the judge directed the jury to disregard, was not in contradiction of the policy, but perfectly consistent with it. Whenever parol testimony will stand with the words of the instrument, it is to be received. Therefore a representation of neutral goods will, though the policy be general, restrain it to such as are represented. So here, the representation being to two ports within four or five hours' sail of each other, must restrain the insurance to two such ports as have been represented. As to the papers offered being mere propositions, every proposition for insurance, when acceded to, becomes a representation, and, as such, is a part of the contract *dehors* the instrument. This is one characteristic difference between representations and warranties. For when the assured inserts in the policy that which he has

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represented, it changes into a warranty. Each, however, is a part of the contract, and each to be performed; the one must be literally, the other may be virtually, complied with. If it was not a part of the contract, there could not be any necessity in the execution of that contract to show it had been fulfilled. As, then, this is to be established, the representation must be referred to, as a test of the acts done by the assured, in order to prove *a [*160] due performance. Therefore, in *Pawson v. Watson*, *Pawson v. Ewer*, and *Bize v. Fletcher*, it was resorted to, to determine whether the defendants had virtually complied with its contents. It follows, that a representation is in all cases admissible evidence to show the basis of the contract. It constitutes a part of the consideration on which the defendant engages. The representation and the risk are correlative. When the representation is made, the risk is calculated, and on this risk the premium is founded. It thus becomes the essence of the engagement upon which the insurer undertakes, and falls within the very rule laid down by the opposite counsel, that recurrence may be had to parol testimony, to show the consideration of an instrument. It is equally within another of the positions taken against us. The plaintiffs admit we may refer to it for the purpose of establishing fraud; we say, then, it was a fraud to state the voyage to be to two ports four or five hours' sail from each other, and then go to two, which are more than two thousand miles apart. The certified proceedings, under the seal of the Portuguese minister, are not offered as a conclusive admiralty sentence, but as evidence of the laws of Portugal, that the seizure was for trading contrary to them, and within a port of that kingdom. On these points, such a document is certainly strong testimony.

THOMPSON, J. delivered the opinion of the court. The great and important questions arising out of this case are, whether the paper writing produced in evidence ought to be considered as a representation or not, or was admissible

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to explain the intention of the parties? (a) I have entertained very considerable doubts on the subject; and considering the importance of the case, as it respects the amount of property involved, and the very able and elaborate manner in which it was argued on both sides, it is with considerable diffidence that I pronounce the opinion, which, after much reflection and examination, I have formed, and in which the court concur. We think the writing in question cannot be deemed a representation; neither was it admissible evidence to explain the intention of the parties to the contract. It could be received for no other purpose than to establish a fraud. A representation is defined [*161] to be a collateral statement, *either by parol, or in writing, of such facts or circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the assurer, to enable him to form a just estimate of the risk. If the fact or circumstance appear on the face of the policy, it becomes a warranty and not a representation: it is essential, therefore, that it be of some matter out of, and collateral to, the contract, and makes no part of the policy. It cannot be said that this policy is silent on the subject of the ports to which this vessel was to sail; they are expressly made a part of the contract, and that, too, with all necessary legal certainty. She was to go to two ports on the coast of Brazil. Supposing there had been no evidence whatever offered of any communications between the parties, previous to the signing of the policy, would it have been void for uncertainty? clearly not: the legal construction, in such a case, would have been to two ports on the coast of Brazil, at the election of the assured. If the course of the voyage, then, be described in the policy with all necessary and legal certainty, this could not be considered a matter collateral to, and making no part of, the instrument. The writing offered to explain it could not, therefore, be

(a) See *Jackson v. Putnam*, 1 Caines' Rep. 358, and note there.

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received as a representation, within the rules of law above laid down: This writing must, we think, be viewed in the light of a series of propositions made on the one side, and answers given on the other, leading to a contract to be consummated by the policy, and intended to serve as a memorandum, whereby to fill it up, and must fall within that very salutary rule of law, that where an agreement is reduced to writing, all previous treaties are resolved into that. To admit a loose and almost unintelligible memorandum, which appears to have undergone some alterations even since the commencement of this very action, in any manner to control the policy, (a) appears to us to lead to too great uncertainty, especially as it is stated in this case that several personal communications took place between the parties previous to the signing of the policy. There appears to be a substantial reason for giving the latitude contained in the policy. The parties contemplated an illicit trade, and it was not certain the vessel could enter the port she wished: it was therefore *left [*162] open, at the election of the assured, according to circumstances. It remains to be examined, whether this writing was competent testimony to explain the policy. It is well observed by Mr. Justice Blackstone, in the case of *Preston v. Merceau*, that courts should be very cautious in admitting any evidence to supply or explain written con-

(a) In *Bates v. Graham*, 2 Salk. 444, a case is cited by Lord Holt, as decided by Pemberton, Ch. J., that on an insurance from Archangel to the Downs, and from thence to Leghorn, parol evidence was admitted to show that it was agreed the voyage should not commence till the ship came to such a place, and that the policy was avoided according to the terms of the parol agreement. But in *Weston v. Bmes*, 1 Taun. 117, this case was denied to be law, and the court decided, that parol evidence of what passed at the time of effecting an insurance, is not admissible to restrain the effect of the policy.

Where the terms of a policy are clear and explicit, the court will not hear any suggestion or proof of mistake; as that an insurance on freight generally, was intended to cover freight earned. *Charlot v. Barker*, 2 Johns. Rep. 546.

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tracts, and that they never ought to be suffered so as to contradict or explain away an explicit agreement. In the case of *Meers v. Ansel*, the court said, no parol evidence is admissible to substantially vary, alter or impugn a written agreement; neither is it admissible to abate or extend a deed. No ambiguity appears on the face of this policy; the words are intelligible, without any aid dehors the instrument. The testimony offered is calculated materially to alter and restrain the policy. As it now stands, the assured had undoubtedly a right to go to any two ports on the coast of Brazil, at their election. If the previous communication on the subject of the voyage is to control the policy, the assured would be restricted to two ports, within four or five hours' sail of each other. This, considering the nature of the trade they were engaged in, might very materially affect, if not in a great measure defeat, the voyage; so far as this writing would tend to establish fraud in the assured, the underwriters have had the benefit of it. It was for this purpose submitted to the jury, and their decision upon it ought, I think, to be final and conclusive. I see no marks of fraud to taint the contract: the deduction of the premium from 33 1-2 to 27 1-2 per cent. appears to have been occasioned by reason of the assured's taking on themselves the risk of seizure in port. This, in a forced trade like the present, was a very great diminution of the risk to be borne by the underwriters.

The voyage contemplated by the assured might have been to Rio Janeiro, and St. Catharine's, as stated by Mr. Blagge: still they might not wish to be restricted to those places; otherwise it is difficult to conceive why they were not inserted in the policy. They choose rather to have a discretion left them as to the ports, and to which the underwriters must have assented, by subscribing the policy in its present terms. James Watson, and the other wit-

nesses who were examined respecting the premium
[*163] do not say that 27 1-2 per *cent. was not an adequate premium for the voyage insured. They only

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speak of a comparative difference of premium between two voyages, to neither of which were the assured restricted by this policy. For it has not been pretended by the underwriters that they were bound to go either to Rio Janeiro or St. Catharine's.

The argument of this case has been accompanied with a motion for a new trial, on the ground of the discovery of new testimony. The testimony alluded to is said to be a copy of the proceedings and condemnation at Para, against this vessel and cargo. In order to grant a new trial on this ground, it ought to appear that the testimony has been discovered since the last trial; or that no *laches* is imputable to the party, and that the testimony is material. In the present case, there are numerous objections against granting the application. It does not appear from the affidavit, that this testimony has been discovered since the last trial, but only that it arrived in New York since that time. From the nature of the evidence, it must have been discovered as soon as the cause of the loss was known, and of course there must have been either a want of due diligence in procuring it, or, if sufficient reasons for the delay could have been shown, application ought to have been made to postpone the former trial. Independent of this circumstance, however, there are objections to the admissibility of the testimony offered, it not being duly authenticated. It purports to come through the secretary of state, for foreign affairs, of the kingdom of Portugal. If it be, as he has contended, a regulation of the government of Portugal, that all judgments and decrees rendered at Para are transmitted to Lisbon, and registered in the department of state, that regulation should have been shown in some authentic way, and the document in question would then appear to come through the proper channel; and, if duly authenticated, might be competent *prima facie* evidence of what it contains. But nothing appears to show that such is the regulation of the mother country with her colony. This document cannot be considered an exemplification of

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a judgment. That should be under the great seal; this is only under the seal of arms of the secretary of state; neither is it a sworn copy of the original, and it [*184] cannot be received as an office copy, it *not appearing that the secretary of state has officially the custody of records of this description. The translation of this document from the Portuguese into the English language, ought to have been made on oath; interpreters are always sworn. The translation of a consul, not on oath, can have no greater validity than that of any other respectable man. But, laying aside all objections as to the manner in which this document is authenticated, we do not consider it material testimony. The purposes for which it is offered are, 1. To show that this vessel was seized in port, and so, the loss not within the risks assumed by the underwriters; and, 2. That she had on board contraband goods, contrary to the warranty of the assured.

In answer to the first, it is expressly admitted in the case, that she was seized *at sea*, off the mouth of the river Amazon. This admission ought to conclude the party on this point.

In answer to the second, the warranty in the policy must be understood to relate to goods contraband of war, and not as against the laws of Portugal; for it was well understood between the parties, that the voyage insured was a forced and illicit trade, contrary to such laws. The contraband goods mentioned in the condemnation must have been understood to be so, in reference only to the laws of Portugal. The ground of the sentence is stated to be, because the captain advisedly and deliberately precipitated himself into port to trade, and there by subjected himself to the penalty of the law of the 18th March, 1605. The opinion of the court therefore is, that a new trial ought not to be granted, and that the plaintiff have judgment on the verdict of the jury.

Postea to the plaintiffs.

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JACKSON, *ex dem.* PELL, *against* PREVOST.

Lands descending between indictment and conviction are forfeited under the act of October, 1779, against persons adhering to the enemies of this state. If a man be known by the addition of *junior* to his name, an indictment against him, without that addition, is not conclusive that he was not the person indicted, if found by a special verdict that he was meant, it being matter of fact on which a collateral issue ought to be taken at the trial.

THIS case was submitted without argument, and came before the court, on special verdict, containing substantially the following facts:

Joshua Pell the elder, of the manor of Pelham, in the county of Westchester, yeoman, the father of the lessor of the plaintiff, was, in his lifetime, seised in fee of the premises in question; and, being so seised, he died on *the 31st day of July, 1781, leaving the [*165] lessor of the plaintiff his eldest son and heir at law.

On the 10th day of November, 1780, at a court of general sessions of the peace, held for the county of Westchester, an indictment was found against Joshua Pell, of the manor of Pelham, in the county of Westchester, yeoman, under the act of the legislature of this state, passed the 22d of October, 1799, entitled "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state, in respect to all property within the same." In October, 1782, judgment was pronounced against Joshua Pell, now, or late of the manor of Pelham, in the county of Westchester, yeoman, by default, he having been duly notified to appear and traverse the said indictment, pursuant to the directions of the act aforesaid. This judgment was signed on the 15th day of July, 1783: it was found Joshua Pell, the lessor of the plaintiff, and not Joshua Pell the elder, was meant and intended by the said indictment and judgment; the lessor of the plain-

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tiff always distinguishing himself as Joshua Pell, jun. The title of the state to the premises in question, was in due form of law conveyed to the defendant, on whom Joshua Pell, the lessor of the plaintiff, entered, after the death of the said Joshua Pell the elder, and became seised thereof, as the law requires.

THOMPSON, J. delivered the opinion of the court. It is submitted to this court to determine whether, from the facts found by the special verdict, the plaintiff is entitled to recover? Two questions appear to present themselves: 1. Whether the judgment must be considered as standing against Joshua Pell the elder, or against Joshua Pell the lessor of the plaintiff; and, 2. The legal operation of that judgment on the premises in question. We think the judgment must be considered as standing against the lessor of the plaintiff. It is expressly found, by the special verdict, that he was the person intended, and the only variance complained of is the omission of the addition of *junior* to his name. Notice was given, pursuant to the directions of the act, to appear and traverse the [*166] indictment; this was enough to put the lessor of the plaintiff on inquiry. He should have appeared and traversed the indictment, and then made the objection. It is now too late. In the case of *Jackson ex dem. St. Croix, v. C. & I. Sands*, decided in this court, in April term, 1801, proceedings under this statute were considered analogous to convictions by bill of attainder, and with respect to the description of the persons convicted, were construed with more liberality than ordinary judicial proceedings; that the identity of the person attainted was matter of fact, triable in a collateral issue, and that an incomplete description of him was not fatal. The finding of the jury, therefore, in the present case, must be conclusive, as to the indemnity of the person. The next question, then, will be as to the operation of such judgment

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upon the premises in question. It appears that the lessor of the plaintiff derived his title by descent from his father, who died on the 31st day of July, 1801. The indictment was found in November, 1780, but judgment was not rendered until the year 1782, which was subsequent to the time when the lessor of the plaintiff acquired his title; and the act under which these proceedings were had, declares the forfeiture to attach upon all the estate which the person had at the *time of conviction*. By this conviction, then, the premises became forfeited, and the title to the same vested in the people of this state, which title has since been, in due form of law, conveyed to the defendant. We are therefore of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

C. and J. SELDON *against* HICKOCK.

A sale of the proportion of one of joint owners of a cargo, with the consent and advice of all the others, severs the tenancy in common, and the vendee may maintain trover for it against the other partners.

TROVER for five hundred bushels of Turk's Island salt. The defendant and two others were joint owners of a cargo of sixteen hundred bushels of salt, one thousand only of which was that of Turk's Island. The two other partners, being unable to pay their proportion of duties and charges, by the advice and consent of the defendant, sold their shares to the plaintiffs. On a refusal to deliver, after payment made, the present action was brought, and a verdict having been found for the plaintiffs, the application was to set it aside, and order a nonsuit to be entered.

Allen, for the defendant. The plaintiffs and defendant *were tenants in common, under the sale [*167] by the two former partners. "If two have jointly,

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by buying, a horse, or an ox, and the one sell to another his part of the said horse, or ox, the purchaser and the other shall possess such chattel in common." Co. Litt. 299, b. Therefore, if a creditor take out execution against one partner, the vendee is tenant in common with the other. *Heydon v. Heydon*, 1 Salk. 892. So, every one deriving title under one partner. *Fox v. Hanbury*, Cowp. 445; *Smith v. Stokes*, 1 East, 863. The persons thus coming in, stand in exactly the same situation as the person from whom they claim; and, therefore, cannot maintain trover against their other co-tenants in common. Esp. N. P. 586; 1 D. & E. 658, *Holiday v. Camsell & White*, and the authorities already cited.

SPENCER, J. It is settled that one tenant in common cannot maintain trover against another, unless that other has destroyed the subject matter of the tenancy. See Co. Litt. 200, a.; *Burnadiston v. Chapman*, Bull. N. P. 34, S. P. But I do not see how that principle will help you.

Allen. The damages are excessive: it is in evidence there were only one thousand bushels of Turk's Island salt on board. The sale was of one third of the interest, and the verdict is for five hundred and thirty bushels, which is more than half of the salt for which the action was instituted.

Foot, contra. Without denying anything that has been said, the sale by and with the consent of all the partners severed the tenancy in common. The undivided third part became the separate right of the plaintiffs.

SPENCER, J. delivered the opinion of the court. The defendant, with two others, (Lord and Sherman,) who were copartners, were tenants in common of the salt. One tenant in common cannot maintain trover against his co-tenant, unless the thing holden in common be destroyed.

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In case of a sale by one, and a receipt of the money, an action for money had and received will lie. In this case Lord and Sherman sold their share, being five hundred and thirty bushels, to the plaintiffs, with the assent of the defendant, and on his advice. He promised to deliver the plaintiffs that quantity, and received from them the proportion of the duties, chargeable to Lord and Sherman. This, then, was a valid sale, and severed the tenancy in common. The damages are not excessive. It does not appear that Turk's Island salt *was of a value superior to the other, which was from the island of St. Thomas. The plaintiffs gave six and six pence per bushel, and have recovered only that amount, with interest. The verdict invades no principle of law or justice: we are, therefore, against the motion. The plaintiff however, must stipulate not to bring any other action for St. Thomas's salt.

Postea to the plaintiffs.

GRAHAM against CAMMANN.

A bill of exceptions does not lie to the charge of a judge of an inferior court: the remedy is by application for a new trial.

IN error on a bill of exceptions tendered to the mayor of the city of New York, on a charge given by him to the jury, in an action brought by the now defendant, against the present plaintiff, for the non-delivery, in good order and condition, of a certain quantity of coffee at Amsterdam, according to his contract; the exception was, that "the said Edward Livingston, Esq., mayor as aforesaid, did then and there declare and deliver his opinion to the

[1] See *Coles v. Coles*, 15 J. R. 189; *St. John v. Standing*, 2 J. R. 468; *Wilson v. Reed*, 3 J. R. 175; *Mercereau v. Norton*, 15 J. R. 179.

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jury aforesaid, that the said several matters so produced and proved as aforesaid, on the part of the defendant, were not sufficient to entitle him to the verdict of the said jury; that the burden of proof to account for the deficiency of the coffee delivered lay on the defendant; that it was incumbent on him to show explicitly that he did fulfil his contract, except as far as he was prevented by perils of the sea; that the defendant was bound, not only to show that there was a loss of the coffee, by the perils of the sea, but how much was lost by those perils, or to give some reasonable account of the quantity; that it was in the power of the defendant to have put a hand on board the lighters which landed the coffee, to prevent any loss therein; that the court was clearly of opinion there was a deficiency of proof on the part of the defendant, which charged him with the loss, and with these directions left the same to the jury, to find for or against the said plaintiff."

The arguments of the counsel being all directed to the charge, whether it was proper or improper, it is unnecessary to detail them, as it was on another ground that the court rested their decision, which was delivered by

SPENCER, J. Without examining whether the [*169] charge of the mayor was *correct or not, as respects the facts, it appears clearly to us that the plaintiff in error has mistaken his remedy. A bill of exceptions ought to be on some point of law, either in admitting or denying evidence, or a challenge, or some matter of law, arising upon a fact not denied, in which either party is overruled by the court. In the present case we can perceive no error in point of law in the charge given. The *onus probandi* of the loss of the coffee, as was stated to the jury, lay on the now plaintiff, and he was bound to show it lost by the perils of the sea, or to give some reasonable account; and although the facts might not warrant the conclusion that there was a deficiency of proof, yet the whole was referred to the jury. To have got rid of their

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finding, instead of a writ of error, there should have been application for a new trial, on the ground of its being a verdict against evidence. It is not for us to say that such motion ought or ought not to have prevailed, but in the present case we cannot see that there has been error in point of law, and are therefore for judgment of affirmance.

Judgment affirmed.

JACKSON, on the demise of G. T. VAN DENBERG, E. VAN VECHTEN, and W. ELTING, *against* J. L. BRADT.

If a statute, without any negative words, declare that all former deeds shall have in evidence a certain effect, "provided" such and such requisites are complied with, this does not prevent their being used as testimony in the same manner as if the act had never been passed. The law of the 8th of January, 1762, declaring that every former division of lands, of which there was a map or note in writing under the hands of the proprietors, should be a valid partition thereof, provided such map or note be proved before a judge of the supreme court, and a true copy of such map be filed, and such note recorded, does not prevent an antecedent map or deed being read in evidence to prove a partition. Where a decree of the court of chancery has ordered partition, in consequence of rights claimed, the title of the parties in favor of whom the decree is made, accrues on such decree, and a possession previous to that time cannot be urged as an adverse possession.^(a) A tenant at will is not entitled to notice to quit. Tenants in common may make a joint demise in ejectment.

EJECTMENT for lands within the Hosick patent, in Rensselaer county.

Gerret Teunis Van Vechten, ancestor of Johannes Van Vechten and Valkert Van Vechten, was one of the four persons to whom, in June, 1688, the Hosick patent was granted. In 1732, it was by the owners divided and laid out in lots. Johannes entered on one fourth, and on the 30th of October, 1741, by deed of this date, granted to his

(a) See *Jackson v. Bowen*, 1 Caines' Rep. 360, n. (a.)

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three sons-in law, Bernardus Bradt, Hendrick Breese, and Barent Van Beuren, as joint tenants in fee, one fourth of the undivided lands in the said patent. In 1749, Hendrick Breese died. On the second of May, 1753, the proprietors of the patent executed a deed confirming the former division, and annexing to each lot the woodland behind it. In the beginning of 1754, Barent Van Beuren died, leaving Bernardus Bradt the only surviving grantee, named in the deed of Johannes Van Vechten, [*170] *executed in October, 1741. On the 27th of May, 1754, a division was made of the patent by one Bleecker, according to which lot No. 38 was allotted to the representatives of Gerret Teunis Van Vechten, and a map of the patent made out according to this division, in consequence whereof, Bernardus Bradt entered and exercised acts of ownership. To the map thus made, was subjoined a partition deed, dated on the 27th of May, 1754, executed by James Van Cortlandt, Hendrick Van Ness, by Cornelius Waldron, his attorney, Bernardus Bradt, and John Baptist Van Rensselaer, the proprietors of the patent, in which, after confirming the divisions of 1732, and 1753, they fully establish the map of Bleeker, covenanting "for themselves, their heirs and assigns, that the division so made and done, should, from thenceforth, and for ever after, stand and remain." In 1759, or 1760, Bernardus Bradt authorized John W. Groesbeck to give permission, on his behalf, to persons who might apply to cut saw-logs on No. 38, in which the premises in question lie. In June, 1763, the partition deed was proved before Robert R. Livingston, one of the judges of the supreme court, and from the endorsement of Bleecker upon it, lot No. 38 appeared to have fallen to Bernardus Bradt as representative of Gerret Teunia, and had, together with all other allotments, gone from the time of the partition deed, in conformity to its provisions. In 1771, or 1772, Bernardus Bradt settled the defendant, his son-in-law, John L. Bradt, upon the land in dispute, in lot No. 38, giving him leave to occupy and possess it. This

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he accordingly did down to the day of action brought. In 1786, or 1787, Bernardus Bradt died, leaving six children; namely, Daniel B. Bradt, John B. Bradt, Hendrick Bradt, Gerret Teunis Bradt, Elizabeth, the wife of John L. Bradt, and Mary, the wife of Thomas Lotheridge; who, in March, 1797, by a decision of the court of errors then made, were ordered to convey in severalty to Gerret Teunis Van Vechten, Cornelius Van Denberg, and eleven others, (the representatives of Valkert Van Vechten,) among whom were all the lessors of the plaintiff, one moiety held by them under the grant of 1741, according to the respective *rights of the parties, and those claiming with [*171] them, as set forth in their bill of complaint, under the will of Valkert Van Vechten, one of the devisees named in the will of Gerret Teunis Van Vechten. In pursuance of the order thus made, the parties therein directed did, on the 15th of February, 1798, convey one undivided moiety of the lands, which they, as the representatives of Bernardus Bradt, held under the grant of Johannes Van Vechten, to the grantees named in the decree. In 1799, a partition was made under the act of the legislature, between the heirs of Bernardus Bradt and the representatives of Valkert Van Vechten, on which lot No. 38 was drawn to the share of the representatives of Bernardus Bradt. In November, 1800, all the representatives of Bernardus Bradt, excepting the defendant and his wife and Hendrick Bradt, executed to the persons to whom the conveyance had been ordered by the court of errors, a conveyance for lots No. 1 and 2, in the eleventh allotment of lot No. 38 the grantees of which last-mentioned grant, on the 19th of May, 1801, by deed of that date, demised lots No. 1 and 2, in which the premises in question are contained, to all the lessors of the plaintiff excepting Lena Van Vechten. At the trial of the cause, before Lewis, Ch. J., at the Rensselaer circuit, in May, 1802, the plaintiff gave in evidence the deed of Johannes Van Vechten, &c. down to the partition and map of the 27th of May, 1754.

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To the admission of this the counsel for the defendant objected; 1. Because it appeared that Henry Van Ness, one of the proprietors, signed by attorney, and no power of attorney was shown; 2. Because the deed was a mere covenant; and did not contain the necessary granting words, to sever the estate before held in common; 3. Because it did not appear that the map had been filed, or the certificate of proof recorded.

These objections being overruled, the plaintiff went on and gave in evidence the possession, according to the map, the decision of the court of errors, the subsequent conveyances, and the possession of the defendant, who, on his part, offered the partition of 1799, and that lot No. 38 was drawn to the share of the representatives of Bernardus

Bradt: he also offered to prove his entry into possession of the premises, thirty-three years *ago, under the permission of Bernardus Bradt, his father-in-law, and a continuance of that possession from its commencement down to the day then present. This the court overruled, on the ground, that the plaintiff's right of entry accrued only from the time of the decree in chancery, on which the appeal in the court of errors had been brought, and, therefore, the possession of the defendant could not run against it. The defendant then insisted, 1. That if his possession was not allowed, notice to quit was necessary; 2. That he was entitled to compensation for his improvements; 3. That there being only two demises in the declaration, one a joint demise from Gerret Teunis Van Denberg, Ephraim Van Vechten and William Elting, the other a demise from Lena Van Vechten solely, the plaintiff had not shown such a title in his lessors as would entitle him to recover. These objections being also overruled, the jury found for the plaintiff a verdict for ten-twelfths of the premises in question. Application was now made for a new trial.

Woodworth, (Attorney-General,) for the defendant. The map of 1754 ought not to have been received in evidence.

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By the 6th section of the act of January, 1762, vol. 1; Colon. Laws, 408; Smith, vol. 2, p. 242, it is declared, that every former division of lands, of which there was a map, or note in writing, under the hands of the proprietors, should be a valid partition, provided such map, or note, be proved before a judge of the supreme court, and a true copy of such map filed, and such note recorded. Neither provision was complied with, and therefore the evidence was improperly received. Had Bernardus Bradt been the plaintiff, notice to quit must have been given, as the entry of the defendant was under his permission. At the time this permission was given, Bernardus Bradt was the sole legal owner of the estate. The lessors coming in by the decree in chancery into his estate, must take it with all those equitable claims and rights to which it was subject in the hands of Bernardus. Of these, notice was one. But if they deny any privity to his estate, then our possession must avail, for the right of the lessors did not accrue on the decree; they were only settled and ascertained by it. Indeed the contrary is the fact; *the decree [*178] was founded on, and arose from, their rights, against which we show a possession of thirty-three years. That tenants in common cannot make a joint demise is a settled point. 2 Wils. 282. *Heatherly, on the demise of Worthington and Tunnadine, v. Weston and others.*(a)

Henry, contra. Had the statute referred to, contained any negative words, that "without such recording," &c. the map should not be evidence, the arguments on the other side would apply. The map and deed were not offered as testimony under the act; but in the same manner as an old terrier, or survey, having weight from its antiquity. This circumstance gives validity to the deed itself;

(a) A further point was made on the subject of compensation for the improvements, but as the court did not make any decision upon it, and ordered a further argument on that question, it is unnecessary now to detail what was urged on the subject.

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for after such a lapse of years, a power of attorney to execute must be intended, as possession had gone according to the instrument. *Doe v. Prosser*, Cowp. 217.(a) On the point of our right of entry being tolled, it is sufficient to say the possession to effect that must be adverse. Here both parties derive under Bernardus Bradt, and our title did not accrue till the decree in 1797. Notice to quit was perfectly unnecessary. To be entitled to it, there must exist the relation of landlord and tenant between the parties, by reserving a rent. None such is shown here. Woodfall's Law of Landlord and Tenant, 160. Besides, the offering to set up an adverse title did away all right to notice, had any ever subsisted. No force can be allowed to the objection against the demises. The action itself is a mere form. The court, therefore, will so direct it, as to be entirely conducive to the justice of the case.

Woodworth, in reply. It is conceded, that had the statute contained negative words, the map could not have been received. We contended the proviso was equivalent; otherwise it is totally inoperative. As to the reservation of rent, it certainly is not necessary that it should be made, to create a tenancy at will; and what formerly were tenancies at will are now held to be tenancies from year to year. Notice, therefore, was indispensable.

(a) Thirty-six years' exclusive possession by one tenant in common, held sufficient to warrant a presumption of ouster of the other. See *Warren ex dem. Webb v. Greenville*, on a recovery 40 years old, the court presumed a surrender of the life estate to make a good tenant to the *principis*. But in *Goodtitle v. Chandos*, 2 Burr. 1072, where the possession had not gone according to the deed, the court would not presume a surrender. The rule is, that where there is a fact to warrant a presumption it will be made; but there must be some circumstance out of which the presumption is to arise. This rule rests on the maxim of *ex nihilo, nihil fit*. *Van Dyck v. Van Buren*, 1 Caines' Rep. 90, n. (a.) to which, after the principle for which *Keen v. Earl of Effingham*, 2 Stra. 1267, is cited, add, "so where a will was adduced to prove a tenancy in common, but abandoned as proof, on account of the insanity of the testator being established, the door was shut against the presumption of any other title." *Jackson v. Vosburgh*, 9 Johns. Rep. 270.

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KENT, J. delivered the opinion of the court. Upon this case several questions have been raised on the part of the defendant, on a motion for a new trial. 1. It was contended that the map and deed of partition were not admissible, *because a copy of the map had [*174] not been filed, and the note of the division recorded. The act of the 8th January, 1762, s. 6, declares, that every former division of lands, of which there was a map, or note in writing, under the hands of the proprietors, should be a valid partition thereof, provided such note be proved before a judge of the supreme court, and a true copy of such map be filed and such note recorded. If the condition on which all such previous partitions were declared valid, be not performed, the transaction is left as it was before, and is to be considered independent of the act. The division, and the deed between the proprietors by which they covenanted to abide by it, and the separate possessions taken in pursuance of that division, were sufficient to sever the tenancy in common, which consisted in nothing but a unity of possession. The parties became concluded and bound by that act, and the map and deed being proved before a competent officer, and possession having gone accordingly, they were admissible as legal evidence in the case.

2. Another objection taken was, that the defendant was entitled to notice to quit. It has been frequently decided by this court, that a mere tenant at will does not require notice to quit. The circumstances under which the defendant was placed on the premises, prove him to have been strictly a tenant at will. There were no terms prescribed, nor any rent reserved, or demanded, or paid. The defendant was merely directed to occupy the land, which gave him more the character of a bailiff than a tenant. There is nothing from which we can consider this to have been a holding from year to year. The reservation of an annual rent, is the leading circumstance that turns leases for uncertain terms into leases from year to year. This

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was, therefore, not a case requiring notice to the defendant.

8. The last objection made by the defendant to the verdict was, that no title corresponding with a joint demise by three of the lessors was shown. The title shown proves that the lessors of the plaintiffs are all tenants in common. If this objection be well made, the plaintiff is still entitled to recover the proportion of the premises belonging to the lessor, who demised separately, and the recovery [*175] must be *modified accordingly. The point has been frequently declared and adjudged, that tenants in common cannot make a joint demise, and yet the books frequently speak in terms inconsistent with this position. Littleton says, that two tenants in common may make a lease of their tenements to another for a term of years, rendering rent, and may, in consequence thereof, have a joint action against the lessee for the rent. So it is said that they may join in a lease to a third person, and that lessee make a lease to try the title; and again, one tenant in common may make a demise of the whole premises, and under that demise may recover an undivided moiety. The case of *Heatherly, on the demise of Worthington and Tunnadine, v. Weston and others*, which was the latest and most solemn decision against the competency of a joint demise, assigns as a reason, that the estates of tenants in common are several and distinct, and there is no privity between them. But it appears to me, there is the very privity requisite in this case to make a lease—the unity of possession. The lease is only a transfer of the possession which is common between them. It is no transfer of the rights of property, which is distinct, and in which they truly have no privity. The action of ejectment is founded on the fiction of an ouster of possession merely; and I see no reason why tenants in common may not act jointly in disposing of their joint possession. If they can in any case make a joint lease, as the books admit,

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their joint lease in the present case is sufficient, because the fiction is answered, which only requires a lease competent to transfer the possession for a given term of years. And since this is a mere fiction, and the whole action liberally considered, and the recovery, though it be for the possession only, yet it does, in effect, enure to each lessor, according to his title, we ought to give effect to the demise, if, by any possibility of law, it can be adjudged good. If the action of ejectment be considered distinct from the fiction of lease, entry, and ouster, two tenants in common could not join at all in the action; for it is a general and settled rule, that in all actions real and mixed, tenants in common must sever, because they have several freeholds, and claim by several titles. They cannot, therefore, join

*in a writ of right, or in an action of assize: each [*176] must have a separate assize for his moiety. Hence,

Coke lays it down, that tenants in common shall not join in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quære ejecit infra terminum &c.*, for these actions concern the right of lands, which are several; but since the introduction of a fictitious lessee, tenants in common have been permitted to join in an action of ejectment, and the practice has been only to require a fictitious lease from each tenant in common. The old rule is already completely evaded by means of the fiction. In opposition to Littleton and Coke, it has long been the established practice to permit tenants in common to join in the mixed action of *ejectione firmæ*, and when that action has become in form only a mixed action, and in substance a real action, for trying the title of the fee. Having carried the fiction thus far, we ought not now to suffer ourselves to be entangled in this very fiction, and sacrifice substance to form. If two tenants in common are competent to join in the lease or transfer of their joint possession, it is sufficient; and for these reasons we must hold, even in opposition to several authorities, that it has now become immaterial whether

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tenants in common declare on joint or separate demises;(a) and accordingly we are of opinion, on all the points, that the defendant take nothing by his motion.[1]

New trial refused.

 CLINTON against PORTER.

If on demand of *oyer*, that given be different from that set out, the plaintiff cannot, without rule or notice after service of a true *oyer*, sign judgment by default. If it be done the court will set it aside, with costs.

IN debt on a bond, the plaintiff set out the real *oyer* of it. The defendant then demanded *oyer*, which was given to him variant from that set out, on which the defendant pleaded *non est factum*. The plaintiff then, without any rule or notice, served a fresh *oyer*, setting out the bond and condition truly; twenty days having elapsed, he signed judgment by default.

(a) The English decisions do not seem to sanction the full extent of the position in the text, yet they avail themselves of the most trifling circumstance to obviate the formal objection of the demise being joint, when the title is several; therefore payment of one entire rent to the agent of two trustees, appointed at several times, estops the tenant from showing, in an ejectment on a joint demise, that the lessors are tenants in common. *Doe v. Grant*, 12 East, 221. Though several parceners constitute but one heir, and the entry of one for a condition broken enure to the benefit of all, she may, on her sole demise, recover her own share. *Doe v. Pierson*, 6 East, 173. For the sole demise of a joint tenant to the plaintiff in ejectment severs the joint tenancy, and entitles to a recovery for the lessor's proportion. *Denne v. Judge*, 11 East, 287; *Roe v. Lonsdale*, 12 East, 39. If all the joint tenants make several demises to the plaintiff, he is entitled to recover the whole, for all the estate is vested in him. *Doe v. Read*, 12 East, 57.

[1] As to notices to quit, cases on the subject collated and compared in *Jackson v. Miller*, 7 Cow. 747. As to tenant at will, see *Nichols v. Williams*, 8 Cow. 18; *Jackson v. Vincent*, 4 Wend. 833; *Jackson v. Salmon*, 4 Wend. 617; *Rowan v. Lytle*, 11 Wend. 618; *Bradley v. Covel*, 4 Cow. 349; *Phillips v. Covert*, 7 J. R. 1; *Joss v. Joss*, 13 J. R. 235; *Young v. Ellis*, 13 J. R. 118; *Jackson v. Aldrich*, 13 J. R. 106; *Jackson v. Babcock*, 4 J. R. 418; *Van Allen v. Rogers*, 1 J. C. 33; S. C. 2 O. C. E. 314; *Jackson v. Bratt*, 2 Cal. R. 169; *Jackson v. Wilson*, 9 J. R. 267.

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Emott, on affidavit disclosing the above facts, moved to set aside the default and subsequent proceedings.

Van Vechten, contra, insisted that the case was within the eighth rule of April, 1796, which allows of amending declarations, &c., and that all permitted by that rule might be done of course.

Per Curiam. Take the effect of your motion with costs.[1]

Motion granted.

*JACKSON, *ex dem.* QUACKENBUSH, against [*177]
DENNIS.

The boundaries of the Hosick patent are according to the survey made by John R. Blescker in 1784, S. P. 2 Johns. Rep. 297; 5 Johns. Rep. 496 506; 9 Johns. Rep. 102.

THIS was an ejectment for lands lying in the county of Washington, to which the plaintiff claimed title under a royal grant, dated in 1770, and the defendant under one of 1688, commonly called the Hosick patent. The only question between the parties was, what is the true construction of this latter grant as to boundary? The description in the patent is: "All that tract of land situate, &c.,

[1] Where the *oyer* varies from the instrument declared on, the defendant may set it forth in his plea and demur, or he may, without setting it forth, plead *non est factum*, and avail himself of the variance at the trial. *Ellis v. Parry*, 6 Wend. 629. After twelve days demand of *oyer* by the plaintiff of a release pleaded by the defendant, he may treat the plea as a nullity and enter the defendant's default. *Field v. Goodman*, 4 Wend. 214. A small difference between the *oyer* of a bond and the declaration is not regarded. *Henry v. Brown*, 19 J. R. 49. The defendant has the same time to plead after delivery as at the time of demand. *McIntosh v. Van Tine*, 8 Cow. 132; see *Varick v. Bodine*, 3 Hill, 444.

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on both sides of a certain creek called Hosick, beginning at the bounds of Schackook, and from thence extending up the said creek, &c., being in breadth, on each side of the said creek, two English miles; that is to say, two English miles on the one side of the said creek, and two English miles on the other side of the said creek, the whole breadth being four English miles."

LEWIS, Ch. J.(a) delivered the opinion of the court. This creek is so situated that it is impossible to run parallels to it, which shall be always two miles distant from it in its whole extent. It becomes, then, a pretty nice question what principle shall be adopted in the locating of the grant. Several ingenious ones have been proposed, all of which are liable to exception. For the plaintiff it is insisted that the most rational, correct, and advantageous one to the crown, would be to make a traverse of the creek and taking such line for a base, to run parallels at two miles distance on each side. The objection to this is, that such parallels would, in many points, approach nearer to, and in others recede further from, the creek than two miles.

For the defendant it is contended, that the principle adopted by John R. Bleeker, the surveyor, who run out the tract in 1754, is to the full as correct, if not more so, than the former. The mode he adopted was, so to run the outlines as to be enabled, at every point in them, to strike the creek at two miles distance in some one direction, though he might be nearer to or further from it than two miles, in other directions. This mode was considered by three surveyors of intelligence, who were examined as witnesses on the trial, to be the most practicable, and better calculated than any other to satisfy the words [*178] of the patent. These opinions *have considerable weight with us; and when it is considered that

(a) This decision was delivered in November, 1803, and ought to have been reported as of that term.

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the lands in this patent have been uniformly settled agreeably to that survey, and that the premises in question have been so held for much more than 20 years, we think we ought to have stronger reasons than any that have been offered, to induce us to disturb such ancient possessions. We are, therefore, of opinion, judgment be entered for the defendant.

Judgment for the defendant.

JACKSON, *ex dem.* VAN SLYCK and others, *against* SON.

When a defendant cross-examines a plaintiff's witness, he makes him his own. Therefore, parol testimony of a deed or will, disclosed by such witness, in the possession of the plaintiff, cannot be received without notice to produce it. (a)

IN ejectment on a motion for a new trial. It appeared that at *nisi prius* the plaintiff claimed by descent. On the cross-examination of one of his witnesses by the defendant, it came out that the ancestor had made a will, of which the judge, who heard the cause, admitted parol testimony, without any notice to produce it having been given.

Per Curiam. A new trial must be awarded with costs to

(a) The old rule in Westminster-hall, and which by a very learned judge has been called "the sensible one," was, that of an instrument coming from the opposite side, after notice to produce it, proof from the party who called for it was not required; the very circumstance of its being with the other side, being *prima facie* evidence of due execution, and from its being in such custody the probable ignorance, in the party noticing, of the names of the witnesses. *Rex v. Middleway*, 2 D. & E. 41. But in *Gordon v. Secretan*, 8 East, 548, it was ruled that a party calling for a deed from the opposite side, must prove it in the same manner as if it had come out of his own possession; and the practice extends not only to sealed, but unsealed instruments. *Weltherston v. Edgington*, 2 Camp. 24. A notice to produce papers extends to the time of trial, and is not confined to the circuit or sittings for which the cause has been noticed for trial. *Jackson v. Sherman*, 6 Johns. Rep. 19.

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abide the event. When the defendant cross-examined, he made the witness as much his own as if he had himself called him.^(a) He, therefore, could not introduce through him any proof, which would not have been legal, had the witness been originally produced on his behalf. In *Jackson, ex dem. Van Rensselaer v. Clark*, April term, 1801, the same point was ruled. The judge, therefore, was clearly wrong in admitting parol proof of a will, as the party did not show any notice on the opposite side to produce it.

New trial.

(a) The English courts adopt another principle; they consider a witness called by the plaintiff as his witness, even after a cross-examination, being dismissed, and called back by the defendant. *Dickinson v. Shee*, 4 Esp. Rep. 67.

PROMOTIONS.

KENT, J. Chief Justice, vice LEWIS, elected Governor.

DANIEL D. TOMPKINS, Counsellor at Law, to the office of Judge.

END OF AUGUST TERM.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN NOVEMBER TERM, IN THE TWENTY-NINTH YEAR OF OUR INDEPENDENCE.

LAWTON and others *against* THE COMMISSIONERS OF
HIGHWAYS FOR THE TOWN OF CAMBRIDGE, IN WASH-
INGTON COUNTY.

A *certiorari* lies to the judges of the common pleas, on an appeal to them from the commissioners of highways. On a return by the judges to such a *certiorari*, not stating what proceedings were had before the commissioners, the intendment of law is, that they were regular. What is returned without being required and not asserted as a fact, but merely as matter of belief and information, is irrelevant, and not to be regarded. If the return state a road to have been laid out, it will be presumed it was of the proper width, unless the contrary appear.

On *certiorari* to three of the judges of the common pleas of Washington, to return an appeal to them from the determination of the commissioners of highways, for the town of Cambridge, "and also the decision, judgment, process, and proceedings of the same, with all things touching the same," the return stated the appeal to have been on the laying out a public road or highway through part of the

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town of Cambridge; it then set forth the minutes, or memorandum, as it was termed, of the laying out, by precise courses and distances; but the width of the road was not given, nor was it specified whether it ran through improved or unimproved land; neither did it mention that it was laid out on the request of twelve freeholders under oath. This memorandum was signed by the commissioners, and directed to the town clerk, requesting him to record the same as a public road, and to it another memorandum subscribed by the same commissioners was subjoined, in the following words: "Likewise a piece of road south of Mr.

William Hill's dwelling-house," &c. describing the [*180] courses and distances, but *without specifying any request to record it, either as a public or private road. The return further stated that the judges, according to the act of the 8th of April, 1801, (1 Rev. Laws, 588,) met on this appeal, and after hearing reasons for and against the road, affirmed the determination of the commissioners; adding, however, that when this was done, they were not informed or advised that the highway was laid out through a garden, which had been cultivated as such for at least four years, without the consent of the owner (sec. 15,) thereof, which had been since communicated to them, and which they believed to be true.

To this return the plaintiff assigned the following errors: 1. That it did not appear that twelve freeholders had certified, under oath, that the road was necessary; 2. That the commissioners had not caused the laying out to be recorded; 3. That it did not appear whether the road was laid out as a public or private road; 4. That from the return of the judges, it appeared that the road was run through a garden, improved as such more than four years; 5. That the width of the road was not stated, which ought to be done with definite boundaries.

Not, for the defendants. Before entering into the discussion of the errors assigned, it may be well to observe,

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that by the 2d section of the act, under which the proceedings complained of have taken place, the decision of the judges of the common pleas is made conclusive. It may be questioned, therefore, whether this court, in the present instance, has jurisdiction.

KENT, Ch. J. We will think of that matter; in the mean time let the argument proceed.

Van Vechten, for the plaintiffs. By the last proviso of the 15th section of the act to regulate highways, it is ordained, "that no road shall be laid out through any improved land, without the consent of the occupant, unless upon the application of twelve respectable freeholders of the town, certifying on oath that such road is necessary and proper." This regulation, it appears from the return, has not been complied with. As the power by which it was to be carried into effect is a special delegated power, it must be strictly pursued, and so shown to the court. The same observation applies to the 2d and 3d exceptions. The direction to record is confined to the first road, and cannot extend to the second; for as the whole proceeding is in derogation of the rights of individuals, [*181] nothing can be taken by way of intendment. The importance of stating the nature of the road, whether private or public, is manifest from the 17th section of the act; the first are to be not more than three, the latter not less than five, rods wide. On the face of the return it appears that the road was laid out contrary to law. It is expressly stated that the judges knew not, till after confirmation of the acts appealed from, that the road went through a garden improved for more than four years. Had the requisites of the act been complied with, this must have appeared. It is plain, then, that without adhering to the directions of the statute the commissioners have laid out a road, infringing on private rights, and contrary to the act. For these

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reasons we contend the judgment must be reversed; besides, the commissioners' proceedings are not returned.

Foot. contra. The return made by the judges carries a spirit of partiality.

KENT, Ch. J. No imputation can be received against inferior magistrates, unless they stand charged with improper conduct. They are not here to answer for themselves. The only question is, are the proceedings regular or not?

Foot. The judges are not bound to return any thing which was not before them; therefore the application of twelve freeholders, &c. and all that constituted grounds for the commissioners to proceed, need not appear. From the face of the return it is evident the road laid out is ordered to be recorded as a public road. The direction for the latter is, that it shall be "*likewise*," which is as much as to say, in the same manner as the former. It cannot be intended from the record, that the road went through a garden. If the proceedings do not show intrinsic error, it will be presumed they are correct. The law prescribes the width of the road, and till the contrary appear, the inference must be, that the directions of the statute have been complied with.

Van Vechten, in reply. The reasoning of the opposite side is in effect this, that the court must decide on what is, from what does not appear; therefore a compliance with the act must be presumed, because it is not shown. This is contrary to every principle relating to inferior jurisdiction.

SPENCER, J. delivered the opinion of the court. It is made a question, whether a *certiorari* is gratable to remove into this court these proceedings, the statute hav-

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ing declared the decision of the *judges of the [*182] common pleas, on an appeal made to them, to be conclusive.

It is a position beyond contradiction, that the king's bench, in England, (and this court is clothed with the same common law authority,) has jurisdiction, and may award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute finally to hear and determine. 4 Hawk. 144.

A *certiorari* has been held to lie to commissioners of sewers. In the case of Cardiff Bridge, 1 Salk. 146, and 1 Ld. Raym. 580, a *certiorari* was granted to remove certain orders of justices of the peace, made pursuant to a private act of the parliament, for repairing the bridge; and it was there decided; that wherever new jurisdictions are erected; be it by private or public act, they are subject to the inspection of the king's bench by writ of error, *certiorari* and *mandamus*. The authorities to this point are so numerous and uniform, that it cannot be necessary to enlarge. The necessity of a superintending power to restrain and correct partialities and irregularities which may be committed by inferior officers, is so obvious and indispensable, that the court ought by no means to deny themselves a jurisdiction of such salutary influence.

Though the general power of the court is indisputable, there are cases where they will not interfere. In the case of a poor rate, they will refuse the writ; as also in the assessment of the land tax, from a regard to the public inconvenience. *The King v. King and others*, 2 D. & E. 235. In cases, too, depending wholly on the discretion of persons authorized to do an act, this court hath refused to interfere; I allude to an application made for a *mandamus* to the commissioners of highways of Rhynebeck. There the court perceived that its interference would be nugatory, because the commissioners had a discretion to lay out, or

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refuse to lay out, the road applied for. The present is a different case; the regularity of the proceedings is questioned, and most certainly the court cannot want jurisdiction to inquire into it, when a freeholder shall apply to them not to be disturbed in his freehold, but by proceedings conformable to law. The answer to the first exception is, that the *certiorari* having been directed to the judges of the common pleas, the court cannot require or expect from them a return of any proceedings not before them. The application may have been made by [*188] *the twelve freeholders, and still the judges have no knowledge of the fact: in our opinion, their authority to hear the appeal was confined to the merits alone—the fitness or unfitness of laying out the road. Hence, on this return, to intend that the proceedings before the commissioners were irregular, merely because the judges have not returned them, would be unreasonable and unwarrantable.

The return answers both the 2d and 8d objections; the road was directed to be recorded, and was laid out as a public road.

As to the 4th objection, the return made by the judges, relative to the garden, is not to be regarded, for two reasons: 1. It is not asserted as a fact that the road ran through a garden improved four years: 2. It is inserted, without warrant, not being ordered to be returned, and is not to be regarded. 2 Salk. 492.

As to the 5th objection, the 18th section of the act requires that all public roads, to be laid out, shall not be less than four rods. Where the commissioners are silent with respect to the width, in our opinion the court ought to intend that the road is of that width. We think, therefore, the proceedings ought to be affirmed.[1]

Judgment of affirmance.

[1] See the case of *People ex rel. Woodward v. Covert*, 1 Ell, 674; *Allyn v. Commissioners of Highways in Schodack*, 19 Wend. 342; see (secs. 36, c. 33, N. R. L. 282,) *Commissioners, &c. v. Claw*, 15 J. R. 537.

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JACKSON, *ex dem.* DUNBAR and THORN, *against* TODD.

A conveyance of lands adversely held is void, though the title under color of which the person holds may be bad.

THIS was an action of ejectment to recover lot 25, in the town of Marcellus, and tried before Mr. Justice Thompson, on the 25th of June, 1803, at the circuit court held in Onondaga.

The plaintiff deduced his title from William Dunbar, one of the lessors, a soldier in the revolutionary army, and to prove it, adduced, first, the patent from the state for the lands in question, dated the 8th July, 1790. Then a deed of the 8th March, 1784, from Dunbar to Zebulon Mercy; another of the 23d June, 1794, from Mercy to Zephaniah Platt; and a further deed of the 5th September, 1797, from Platt to William Thorn, one of the lessors of the plaintiff, which last, like all the others, was duly acknowledged and recorded.

On the part of the defendant there was given in evidence a deed from William Dunbar, the soldier, to Isaac Brooks, for the lands in question, dated the 12th September, 1791, registered *according to law, and proved at [*184] the trial by one of the subscribing witnesses. A conveyance duly acknowledged and recorded was then offered, dated the 10th of December, 1794, from the executors of Brooks to Benjamin Isaacs, in consideration of 240*l*. This testimony was objected to, but received. After which it was proved that the defendant entered on the premises about 8 years antecedent to the trial, (some time in 1795,) when one Cady was upon the lot in question, had made some improvements, and claimed possession. That the defendant purchased of Cady the possession, excepting, where the actual improvements were made, and that the places where those improvements were made are now held by one Taylor, who holds under William Thorn, the lessor

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of the plaintiff. Todd had held his possession under Isaacs for about seven years, and had made very considerable improvements.

On these facts the defendant contended that his possession being adverse to the title of Zephaniah Platt, on the 5th of September, 1797, no title passed by the deed of Platt to the lessor of the plaintiff.

The judge, however, charged that the executors of Isaac Brooks showed no power or authority to convey real estate, and the inference of law would therefore be, that the title of Brooks (if he had any) would descend to his heirs, and that Benjamin Isaacs derived none from this deed, sufficient to qualify the possession of the defendant as adverse to the title of Zephaniah Platt, at the date of his deed to William Thorn, or prevent its operation to vest a title in him.

Upon this charge the jury found for the plaintiff. The cause now came up on a case made, subject to the opinion of the court: if it should be for the plaintiff, then the verdict to stand, if not, to be set aside and a new trial granted.

Emott, for the defendant. In ejectment the plaintiff must recover on the strength of his own title. The question, therefore, in the present case, will turn on the conveyance of Platt to Thorn, on the 5th September, 1797. For, if that be good and operative, the verdict is right. But at the time when it was executed Cady was in possession, and this possession purchased by the defendant who held under Isaacs. It is plain, then, that anterior to the deed from Platt, there was a possession adverse to him; if so, his conveyance did not pass any thing. *Van Dyck v. Van Beuren & Vosburg*, 1 Caines' Rep. 90. It is not necessary to enter into the learning on disseisins, as our possession was adverse, [*185] But if it was, I should contend we gained a fee; for whoever enters under color of title, by grant, acquires, against any other claimant, a fee by disseisin. *Buckler's Case*, 2 Rep. 55.

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Harrison, contra. There is no dispute respecting the doctrines of adverse possession, or disseisin. To effect the one, or create the other, there must be an adverse entry and ouster under claim of title and right of freehold; because a mere entry, without an idea of being considered as proprietor, is a holding under the rightful owner. Such, we say, was the entry of Cady, and such the possession gained from him by the defendant. The subsequent act of Todd, supposing him either by attornment or deed to have acknowledged the title of the executors of Brooks, as against us, is inoperative; for, after a possession under the lord of the fee, no act by the tenant and a third person, though claiming title, can affect the owner under whom the original entry was made. *Blunder v. Baugh*, Cro. Car. 303, 304.

Emott, in reply. Though no title is shown in Cady, yet the improvements were of a nature to evince a claim of property. This is sufficient to prevent the operation of Platt's deed.

KENT, Ch. J. We are of opinion that the evidence established an adverse possession in the defendant(a) at the time of the execution of the deed from Platt to Thorn. The defendant was then in possession, holding under B. Isaacs, who claimed title under a deed for a valuable consideration from the executors of Brooks. This was a claim under color of title adverse to the plaintiff's title, and sufficient to destroy all presumption that the defendant was in possession under the plaintiff, or held in obedience to his right. His possession was the possession of Isaacs, who claimed the lot as his own. We have repeatedly decided that a conveyance of lands held at the time adversely was void. *Brinkerhoff* ad. *Jackson*, ex dem. *Jones* and others, April term, 1802. Also *Caines' Rep.* vol. 1, p. 90, and

(a) See *Jackson v. Brown*, 1 *Caines' Rep.* 28, n. (a.)

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that adverse possession was equivalent to ouster, and made the statute of limitations to run. *Jackson, ex dem. Putnams, v. Bowen*, November term, 1803, 1 Caines' Rep. 558. *Jackson, ex dem. Gansevoort and others, v. Parker*, April term, 1802. The verdict ought, therefore, to be set aside for misdirection, with costs to abide the event.

LIVINGSTON, J. In determining this cause it becomes necessary to ascertain the nature of the defendant's possession, on the 5th of September, 1797. If it were [*186] then adverse to the title of Platt, *nothing passed by his deed to Thorn, and a new trial must be had. To settle this point it cannot be useful to examine very minutely how or with what intentions Todd or Cady came into possession. If the premises were then vacant, and Cady came in as a mere occupant, or intruder, without any claim of title, this alone would not prevent an alienation by the real owner, or be regarded as a holding adverse to his title; but, because Cady came in without title, why should not he, or his alienee, be permitted to acquire one as soon as it was discovered where it resided? or, because they had entered as trespassers, were they always to continue such, and that against their own inclination? It will be better, and we shall be less liable to error, which unnecessary refinement too often produces, if, instead of inquiring how Todd first acquired possession, we confine our attention to his situation and the manner of his holding at the date of Platt's deed. If he then held in opposition to him, or under a title different from, or hostile to, his, this conveyance was void, and Thorn could take nothing by it. However the defendant may have obtained possession, which, by the by, was fairly, that is, by purchase of Cady, it is certain that at the period we are speaking of he had also bought of Isaacs, who was a purchaser for valuable consideration of the executors of the last will of Brooks, who was the grantee of Dunbar, under whom the plaintiff likewise claims. Whether these executors were empowered to

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sell, or whether the title of Brooks had been legally transmitted to Todd, is very unimportant. It is sufficient that he claimed under a title, which was opposed to the pretensions of Platt, which were founded on a deed from a different grantee of Dunbar. As the defendant, then, at this time, was not only in actual possession of these lands, but held them by title derived from the patentee, which he thought a good one, under him, that is, as his tenant, it is impossible, without perverting the most common terms, to give to such an occupancy any other appellation than that of an adverse possession. He held by a title different from, and in defiance of, the plaintiff's. If this be not an adverse possession, what circumstances can ever make one? There must, therefore, be a new trial, with costs to abide the event of the suit.

SPENCER, J. A motion has been made in this case for a new trial, on a supposed misdirection of the judge who tried the cause. The only question arising is, whether the possession held by Todd, on the 5th of September, 1797, was such, as that, in judgment of law, the [*187] deed from Zephaniah Platt was operative to convey his title to William Thorn. It has been adjudged by our courts, that the mere possession of lands by a person claiming no title to them, is it not a disseisin of the rightful owner; and, consequently, that he might convey, or devise, notwithstanding the statute to prevent and punish champerty and maintenance. Such possession has been held as not adverse to, nor inconsistent with, the title of the true owner, because it was not taken in hostility to his rights; hence, the statute of limitations will not run in favor of such possessor, nor to the prejudice of the owner. These decisions are not only warranted by legal principles, but are highly important and necessary to be observed, in a country like ours, where there are such quantities of vacant lands, and where there exists a very extensive practice of taking up possessions without color of title. Cady's

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possession was clearly, then, not adverse to that of the true owner, and Todd having originally entered by his permission, it follows that his possession, in its commencement, was not adverse. To constitute a possession adverse to the true owner, which is synonymous to a disseisin in spite of him, there need be no legitimate right, but it must be accompanied with a claim to the land; if, therefore, Benjamin Isaacs had entered under his deed, which, though not stated to be a deed in fee, must be considered as such, I can entertain no doubt that such entry, claiming a right to the land, would have constituted him a disseisor, or adverse holder of the lands; and, consequently, during such disseisin, or adverse holding, Platt could not have alienated the land. Todd was in possession when Isaacs took his deed; or, when he took possession, it was not adverse to the true owner. This possession is now attempted to be retained against Thorn, who, independent of the objection of the adverse holding by Todd, when he received a deed from Platt, would have the undoubted right to recover. The case states that Todd has held possession under Isaacs for about seven years. In what manner, whether as a tenant paying rent, or by purchase, or agreement to purchase, does not appear. It was in the defendant's power to have rendered his relation to Isaacs explicit; failing in this, the fact is too loosely stated to work the consequences which would result to Thorn, from an adverse tenure when he purchased. It is possible that the agreement between Todd and Isaacs was, that the former should hold until the title was ascertained, and this they might construe a [*188] holding under Isaacs. In a case like the present, where the title under which the lessor claims is clearly good, I think the court should be astute in finding grounds to retain a verdict so just; and that, unless legal principles are violated, the court ought not to put the plaintiff to the expense of amending his declaration by making Zephaniah Platt a lessor, and again going to trial in a case where no legal defence can exist. On the ground,

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therefore, that the defendant has not shown by what kind of tenure he held the lands from Isaacs when he could have shown this, I am of opinion the verdict ought not to be disturbed.[1]

New trial granted.

FROST, COLLE, AND CROSBY *against* RAYMOND.

The words "grant, bargain, sell, alien, and confirm," in a conveyance in fee, do not imply a covenant. It is implied by the word "*dedi*" or "gave."

THIS was an action for breach of an implied covenant. The declaration, laying the *venue* in Dutchess county, stated that the defendant, in consideration of \$750, did grant, bargain, sell, alien, and confirm unto the plaintiffs, in fee, lot No. 65, or 76, in Junius, in Montgomery, (now Cayuga county,) the plaintiffs to elect, on or before a certain day, which of the lots they would have, with an averment that the defendant was not seised of either of the said lots, or had any estate in either, so that he could not grant, and hath broken his covenant. The case now came before the court on a motion in arrest of judgment.

Slosson, for the defendant. We rely on the following points: 1. That no covenant arises on the words contained in the declaration; 2. That an eviction ought to

[1] As to how and when adverse possession operates to prevent alienation by the legal owner, see *Jackson, ex dem. Jones, v. Brinkerhoff*, 3 J. C. 101; *Jackson, ex dem. Lathrop, v. Demont*, 9 J. R. 55; *Williams v. Jackson, ex dem. Tebbits*, 5 J. R. 489; *Jackson, ex dem. Bryant, v. Ketchum* 8 J. R. 479; *Jackson, ex dem. Benson, v. Matsdorf*, 11 J. R. 91; *Jackson, ex dem. Smith, v. Vrooman*, 13 J. R. 488; *Whitaker v. Cone*, 2 J. C. 58; *Jackson v. Haledet*, 5 Cow. 216; *Belding v. Pitkin*, 2 Cal. R. 147; *Jackson v. Waters*, 12 J. R. 865; *Jackson v. Gumaer*, 2 Cow. 552; *Olowes v. Hawley*, 12 J. R. 484; *Jackson v. Collins*, 3 Cow. 89; *Jackson v. Jackson*, 5 Cow. 173; *Keneda v. Gardner*, 4 Hill, 469; *Cole and Coe v. Irvine*, 6 Hill, 634.

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have been stated ; 3. That the plaintiffs should have averred an election of the lot they would take ; 4. That the conveyance is void, as being of a freehold, to commence in *futuro* ; 5. That the venue is mislaid.

There is no express covenant in the deed ; if there be any, it must therefore be implied. For, allowing the grantor had not any estate in the land conveyed, his merely selling a fee to which he was not entitled, will not create a covenant. This because the granting an estate in fee is not a warranty of the title in the grantor. None of the words used import a covenant ; that can arise only on the word "*dedi*," and this purely on account of its original feudal acceptation. Co. Litt. 384 a, (n), 332 ; [*189] Touch. 181 ; *Perk. s. 124. In the conveyance of an inheritance, even the word "*enfeoff*," though followed by "*grant*," &c., does not imply a covenant. 2 Bac. Abr. by Gwillim, 66. The general principle is, that where there is a conveyance, no covenant shall be added to it which is not expressed or imported by force of the words used. *Bree v. Holbeck*, Doug. 654 ; *Crips v. Read*, 6 D. & E. 606. But allowing there was a covenant implied, the plaintiff has mistaken his remedy. On an eviction of the freehold, covenant will not lie either upon a warranty in deed or in law, because the recompense is personal, and the plaintiff must have recourse to his *warrantia chartæ* or voucher. 2 Bac. Abr. 76, citing Brownl. 19 ; Keb. 821 ; Hob. 4 ; Yelv. 139 ; Noy, 131. On this account, however, the plaintiff is not without remedy ; for, if he has been deceived in his purchase he has his action on the case in the nature of a deceit. (n) 332, by Butler, on Co. Litt. 384 a. At all events, an eviction ought to be shown, as the covenant relied on is one raised by implication of law. Touch. 161, (n) 2, citing 2 Brownl. 161. On the third point it must be noticed, the conveyance is in the alternative, either of lot No. 65 or No. 76. An election was necessary to give a right of action. It was a condition precedent, and performance of it ought to have been

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averred. *Goodison v. Nunn*, 4 D. & E. 761; *Kingston v. Preston*, cited Doug. 689; *Duke of St. Albans v. Shore*, 1 H. Bl. 270. The fourth point needs not any authority; and on the fifth the premises lie in Montgomery, and not in Dutchess; the action, therefore, even when transitory in its nature, if arising out of the realty, must be where the lands are situated. 1 Com. Dig. 163; Bac. Abr. Visne, pl. 27.

G. B. Van Ness, contra. The question is, whether the words used in the deed, and set forth in the declaration, create, by implication, a covenant or warranty of seisin? The cases cited against this, apply to conveyances by transmutation of the possession, and not such as operate by virtue of the statute of uses. The consideration paid on a bargain and sale, implies a warranty that the bargainer has a title to sell. As, therefore, the conveyance by bargain and sale is now substituted in lieu of the old mode by feoffment, the words of the bargain and sale ought to have the same operative effect in creating a covenant, as the word "*dedi*" in a feoffment.^(a) This is necessary to make the analogy complete. The proceedings here are correct, because they proceed on privity of *con- [*190] tract. To support the position that an eviction must be shown, it would be necessary for us to first commit a trespass; for, as no title passes, in order to obtain one we must make a tortious entry. *Holden v. Taylor*, Hob. 12, is in point, to show that to avail of a breach of covenant in law, under words importing a warranty of seisin, entry and expulsion is not required, though, under a covenant for quiet enjoyment, it might be otherwise. It is contrary to reason to urge we should elect, when the

(a) A bargain and sale vests a use in the bargainee, to which the statute executes the possession. Now, as the use raised must be according to the estate out of which it arises, it follows, that a bargain and sale can convey no greater interest than the bargainer has. But a feoffment operates differently; for, when in fee, it passes the whole estate, and vests in the feoffee a fee, though perhaps a tortious one, and displaces other estates.

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cause of action is that there was no estate out of which we could choose. The same observation applies to the grant being of a fee *in futuro*. With respect to the venue, it is sufficient to say, our suit is brought on privity of contract, not of estate; it may, therefore, be laid wherever we please. 1 Wils. 165; 1 Sell. 248.

Slosson, in reply. If the covenant be implied, it arises from privity of estate, and the locality of the action continues; therefore, on the *rendendum* of a lease, it is local 1 Saund. 241, (n) 5, *ad fin.* With respect to the distinction taken as to the applicability of the authorities cited, being only to cases not operating by the statute of uses, it is settled that conveyances taking effect by way of transmutation of use, receive the same construction as those at common law. *Tanner, ex dem. Peckham and others, v. Merlot*, Willes, 180; *Rigden v. Vallier*, 3 Atk. 784; *Doe v. Morgan*, 3 D. & E. 765.

KENT, Ch. J. delivered the opinion of the court. Several objections are taken to the validity of the declaration. We shall, however, confine ourselves to the first and only important one, viz.: that here was no implied covenant of title. It is exceedingly interesting to the community that this question should be clearly settled, and well understood. We are to examine,

1. Whether a sale of an estate in fee, by the formal and apt words of conveyance, and for a valuable consideration, does of itself imply a warranty or covenant of title. The counsel for the plaintiff contended upon the argument that it did.

2. If it does not, then whether there be any particular word or words in the deed, that by settled construction, have been deemed to amount to such covenant or warranty.

1. It seems upon the first impression to be highly reasonable and just that every person, who, for a valuable con-

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sideration, conveys land as his own, should be held to warrant the title he so undertakes to convey, or that he should render back the *money upon [*191] failure of the title. This was the rule of the civil law in respect to the sale of both real and personal property, concerning which that system scarcely made a distinction, an adequate price implying a warranty. Cod. lib. 8, tit. 45, c. 6; Dig. lib. 19, tit. 1, c. 11, s. 2; Lib. 21, tit. 2; 1 Domat, 79, 82, 83; 1 Ersk. Inst. 203. In the early ages of the feudal law, it seems also to have been considered as an obligation upon the lord to give his tenant an equivalent in case of eviction. This appears clearly from the book of feuds, which gives the report of a case of an action by the tenant against the lord, for investing him with a feud belonging to another, and from which he was evicted. The lord was there held to restore him another fee of equal value, or the price of it in money. Feud. lib. 2, tit. 35, and 80. But, although the feudal writers speak *generally* of the lord's obligation to give the tenant an equivalent in case of eviction, Craig, and after him Sir Martin Wright, thinks this obligation never could have applied to pure feuds which were gratuitous donations for uncertain military services, without price or stipulated render; and that it could only have applied to improper feuds, where it was reasonable it should apply, as in those cases a price was given, or an equivalent contracted for. Inst. to the Law of Tenures, 27, 32, 39, 40. This very question, whether investiture alone, without any express promise, entitled the tenant on eviction to an equivalent, has, it is said, been much discussed by the foreign Civilians; that it is the prevailing opinion among them, that the seller, without any promise, is bound to give an equivalent, if the fief was originally granted for services done, or in the way of remuneration. Butler's note 815, to Co. Litt.

But whatever may be our opinions on the point, as an abstract question, or whatever may be the decisions of the

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civil law, or the feudal and municipal law of other countries, we must decide this question by the common law of England. It was decided in the case of *Seixas and Wood*, (*Ante*, 48,) that, upon a sale of goods without warranty and without deceit, the purchaser took the soundness and quality of them at his peril. We think it is evident that *caveat emptor* has been always recognized in our law books as a fixed maxim, applicable equally to the transfer of lands and chattels.

It is a settled position that an estate in fee may be created by the usual and solemn forms of conveyance, without any *warranty express or implied, and that a conveyance in fee does not *ipso facto* imply a warranty. If it does, our books would be inconsistent and unintelligible on this subject. "If a man," says Lord Coke, (1 Inst. 6a, and also say the judges in *Buckhurst's case*, 1 Co. 1,) "maketh a feoffment in fee, without warranty, the purchaser is entitled to all the charters and evidences incident to the lands, to the end that he may defend himself; for, as the feoffer is not bound to warrant the lands, he cannot be vouched to warranty and to render in value, but the feoffee is to defend the lands at his peril." In the case of *Roswell and Vaughan*, (2 Cro. 196,) in the exchequer, Tanfield, the chief baron, said, "that if one should sell lands wherein another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason he should have an action by the law, where he did not provide for himself." So, in the case of *Medina and Stoughton*, (1 Salk. 211,) Lord Holt observed, "that if the seller of goods have not the possession, it behoves the purchaser to take care, *caveat emptor*, to have an express warranty, or a good title; and so it is in the case of land, whether the seller be in or out of possession, for the seller cannot have them without a title, and the buyer is at his peril to see it." In a much more recent case of *Bree and Holbech*, (Doug. 654,) the action was brought

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to recover back money paid for the purchase of a mortgage deed, which afterwards turned out to be a forgery. Lord Mansfield, and the court of king's bench, ruled for the defendant on this ground, that the assignment contained no covenant for the goodness of the title, except only against the acts of the assignor, and that it was incumbent on the purchaser to look to the goodness of it. This case was afterwards cited and sanctioned by Lord Kenyon, (6 D. & E. 606,) who said that he did not wish to disturb the rule of *caveat emptor* adopted in that case, and in other cases, where a regular conveyance was made, to which other covenants were not to be added.

The case in Douglas may perhaps be thought to have the less weight as there was a covenant against the grantor's own acts, and it is a rule that an express covenant will do away the effect of all implied ones. 4 Co. 80, 86; Vaugh. 126; Cro. Eliz. 674, 675; Butler's notes on Co. Litt. 332; 2 Bos. & Pull. 26; 2 Cha. Cas. 19. But the court do not intimate that *they proceeded upon that [*193] ground. This they would have done had they relied upon the extinguishment of the implied covenant by means of the express one. They adopted the old rule, that if there be no covenant of title in a deed, the purchaser takes, at his own risk, the goodness of the title.

After this rule has been so long understood and practised upon, it would be of the most mischievous consequence to establish a contrary doctrine. The parties to deeds know that a covenant is requisite to hold the seller to warrant the title, and they regulate their contracts accordingly. If there be any fraud in the sale the purchaser has his remedy. If one sell land, affirming he had a good title, when he knew he had no title, an action on the case for a deceit will lie. Com. Dig. tit. Action on the Case for a Deceit, A. 8. 1 Fonb. 366.

2. We are next to examine whether there be any particular words in the granting clause of the deed which imply a covenant.

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Glanville, lib. 7, c. 2, says, generally, that the heirs of donors are held to warrant their gifts, "*donationes*;" and Bracton, lib. 5, fol. 388, b. 389, a, says to the same effect, that "warranty belongs to all charters of simple donation, and that the donors and their heirs were held to warranty unless the deed expressed the contrary. But a charter of *confirmation* did not include a warranty, unless it contained a gift, and if the grantor say, *do et confirmo*, or the charter uses the words *dare, vendere, &c.* such a deed contained a warranty. So if homage was imposed, a warranty was implied." It is a little singular that the old writers make the gift (*donatio*) the reason and ground of the warranty. It is the gift by the operative words *do* or *dedi* that creates the warranty. Accordingly, Lord Coke, 2 Inst. 276, says, that although *dedi* and *concessi* be coupled together, as in the *statute de bigamis*, yet these words *ratione doni proprii* do appropriate the warranty to *dedi* only.

It is our duty to acquiesce in the law as we find it, but we are very naturally tempted to agree with Sir M. Wright, that warranty, instead of being attached to a fee, which was a pure gift, ought more justly to have accompanied a fee, which was created for a valuable consideration.

The statute *de bigamis*, 4 Edw. 1, c. 6, is very material to ascertain the ancient law on the subject, since it was only declaratory of the common law. 2 Inst. 274.

[*194] It says "that *in deeds wherein is contained *dedi* and *concessi* without homage, or without a clause of warranty, and to be holden of the givers and their heirs, by certain services, it is agreed that the givers and their heirs shall be bound to warranty. And where is contained *dedi* and *concessi*, &c. to be holden of the chief lord of the fee, and not of the feoffors or their heirs, reserving no services without homage, or without the aforesaid clause, their heirs shall not be bound to warranty, notwithstanding the feoffor during his own life by force of his own gift shall be bound to warrant."

By this statute, then, *dedi* is declared to amount to a

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warranty for the life of the feoffor; 4 Co. 81, a, and this is the word that Coke considers, (2 Inst. 275, b,) as the real operative word to create a warranty in law, and it hath this effect whether the conveyance in which it is found operate as a feoffment, release, or confirmation.

The statute of *quia emptores*, 18 Edw. 1, which followed soon after, prohibited all subinfeudations, and put an end to homage, which was, in those days, parcel of the tenure reserved to the feoffor, by declaring that it should be lawful for every freeman to sell his own lands, and that the feoffee should hold the lands of the chief lord of the fee by the same services that the feoffor was bound to before. This statute accordingly changed, in a great degree, the operation of the word *dedi*, by confining the implied covenant it contained to *the life of the feoffor*, according to the directions of the statute *de bigamis*, except in cases of gifts in tail and leases for life. 2 Inst. 275. Since that time it has been well understood and declared through all the books, that the word *dedi*, in a deed in fee, amounted to a warranty in law to the feoffee and his heirs *only during the life of the feoffor*. Co. Litt. 384, a; Touch. 180, 182; F. N. B. 184, H; 2 Bl. Com. 800.

This word *do* or *dedi*, which is the apt word of feoffment, as that conveyance was anciently called a *donatio*, is not, however, the word used in the deed before us. The only word, in the present case, that can be considered as implying a covenant, is *grant*; (*concedo*;) Co. Litt. 9, a, b, and that word is carefully to be distinguished from the other; for it is well settled that *concessi*, in a feoffment, or estate of inheritance, implieth no warranty. It only creates a covenant in a lease for years. Co. Litt. 384, a; Bac. Abr. tit. Covenant, B; 5 Co. 17, a; 2 Roll. Rep. 399; Palm. 388; Carth. 98; Pincombe and Rudge, Hob. 3; Yelv. 189; Cro. Eliz. 674. Sir Geoffrey Palmer's opinion, Butler's *note 332, and 2 Col. Jur. 437; 3 Keb. 188, 617. [*195] *Brown v. Haywood*, Noy, 181; Saunders on Uses, 406, 407, note.

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We are not able to assign a very solid reason for this distinction between the force and effect of the words "*give*," and "*grant*." It arose from artificial reasons derived from the feudal law. The distinction is now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the words, or change their established operation.

The other words in the deed, "*bargain, sell, alien and confirm*," have never been considered as implying any covenant whatever in any case. The only *dictum* that appears to oppose the law as now laid down, is that of Lord Eldon, in the case of *Browning and Wright*, 2 Bos. & Pull. 21. He there says that the words *grant, bargain, sell, enfeof* and *confirm*, import a covenant in law. We admit and have shown that the word *grant* imports such a covenant in an estate for years, and so also does the word *enfeof*. But in the case referred to they were used in a deed in fee; and if he means (as it would seem that he did) that they there also imported a covenant, we cannot agree to that opinion, however respectable it may be, as it is opposed to the whole stream of the book authorities. We accordingly conclude that in the present case the motion in arrest of judgment ought to be granted.

LIVINGSTON, J. Though I concur in the opinion delivered, yet as some further reasons influence my own, I shall beg leave to state them. The principal question, and on which I shall decide this cause is, whether the term *grant*, in a modern deed or conveyance, implies a covenant of warranty or seisin, so as to entitle the grantee to his action of covenant for damages against the grantor, in case the latter, at the time of its delivery, were not seised of the premises, or had no estate or title therein?

The attempt to recover damages for a breach of covenant on a deed containing nothing more than the granting words common to almost every instrument of this kind, and in which no express covenant was to be found, struck me as

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novel, and in its consequences highly important. In practice, every purchaser of land, who intends to have recourse in case of eviction against the former proprietor, takes care to have inserted in the instrument of conveyance the necessary covenants for that purpose, thereby ascertaining the precise extent of his liability. When purchases are made upon an understanding *that [*196] the same are to be at the risk of the grantees, who are to have no remedy in case of defect of title, (which cases are very common,) these express covenants are omitted, and deeds of the present form are used; with a full knowledge of this practice, it could not escape me, that to imply a covenant of this kind from any of the granting words of such a conveyance, would be to subject many persons to damages contrary to good faith and the understanding of all the parties to the contract. To such an interpretation, therefore, which was in my opinion to be avoided if possible, I early determined not to give my assent, unless constrained by decisions from which it would have been a dereliction of duty to depart. I could not perceive any magic in the word *grant*, nor why it should import a covenant any more than the other words with which it was connected. They are all inserted for the single purpose of transferring the premises to the grantee, and neither collectively nor separately convey, to professional or other minds, an idea of a particular covenant or obligation on the grantor's part. When, in addition to the practice which has been mentioned, it is recollected that the price of land depends as much on the nature of the grantor's title as on its intrinsic value, it is unreasonable that he should, for an eviction, make compensation in damages to a purchaser, who was apprized of the uncertainty of his estate, and for that very reason gave a smaller consideration for it, upon the express condition, perhaps, of taking a deed without any covenant whatever. If, however, the law be otherwise, the defendants must submit, however contrary to their expectations, or to the understanding of the plaintiff

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himself. But after a careful attention to the authorities cited, I can discern nothing in them from which the present demand can derive any support. On the contrary we shall discover that this "famous monosyllable," as Butler terms it, may be used without any imminent danger to a grantor, and may be frequently omitted without prejudice to a purchaser.

From Littleton it appears that the word *warrantia* alone would create a warranty in deeds, and that neither *defendere* nor *acquietare*, although both of them more significant terms than *concedere*, would have that effect. His expression "*nul autre verbe en nostre ley*" is very strong. Sir Edward Coke, in his commentary on this section, distinguishes between warranties annexed to an inheritance, and to a chattel real—of the former some are warranties in deed, and some in law—a warranty in deed, or an express warranty, is created only by the word warrant, but warranties in law are created by many other words: *dedi* is a warranty in law to the feoffee and his heirs during the life of the feoffor; but *concessi*, or I have granted, in a feoffment or fine implies no warranty. The word exchange doth also imply a warranty; this is also the case on a partition. Butler, in his note on this passage, remarks, that from what is here said, "it most clearly appears that the word grant, when used in the conveyance of an estate of inheritance, does not imply a warranty." This also is the opinion of Sir Geoffrey Palmer. "The word grant," says he, "in a lease for years, is a covenant in law, or a general warranty. But in an estate of inheritance, where the fee passeth, the word grant is neither a covenant in law nor a warranty." So also in 8 Keb. 188, the court inclined to "think that the words *concessi* and *feoffavi*" did not make a warranty in a case of inheritance; and Sir William Blackstone, in his Commentaries, after speaking of a feoffment, informs us, that "in other forms of alienation, gradually introduced since the statute of *quia emptores*, no warranty whatsoever is implied—they bearing, no sort

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of analogy to the original feudal donation. And that, therefore, in such cases, it became necessary to add an express clause of warranty to bind the grantor and his heirs, which is a kind of covenant real, and can only be created by the word *warrantise* or warrant." The same author observes, that "after warranty usually follow covenants, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform something to the other. Thus the grantor may covenant that he had a right to convey, or for the grantee's quiet enjoyment, or the like."

The language of all these authorities, and of several others, which are not here noticed, is uniform, and too intelligible to be misapprehended. Without, therefore, introducing a new rule of law, or considering as constructive, or implied warranties, or covenants, words which in deeds in fee have never yet been received in that sense, it is impossible the plaintiff can recover. Nor is there anything hard or inequitable in denying to the word grant, and to all the others here used, a sense which, *ex vi termini*, no one of them imports, and which it is a hundred to one was not contemplated by either party. In conveyances of real estate, there must always be danger in implying anything that is not stipulated in clear and precise terms. This is the safest way of determining the extent of the grantor's responsibility. Whether he is to defend the property against particular encumbrances, or against those who claim under him, or against all the world, ought not to depend on the equivocal or ambiguous meaning of terms used in the granting clause, but on plain and express covenants, which are now therefore uniformly inserted, where it is intended to render the grantor or his heirs liable in case of eviction or defect of title. The defendant must, in my opinion, have judgment.[1]

Judgment arrested.

[1] What makes a covenant, see *Ball v. Ball*, 5 Cow. 170; *Ball v. Wyke*, 3 J. R. 44. As to express and implied covenants, see *Burney v.*

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JACKSON, *ex dem.* NELLIS, *against* DYSLING.

A possession of 40 years on an acknowledged, though erroneous line, is a good bar to a recovery in ejectment. A parol agreement, to abide by a certain division line, will be sufficient, *ut semble*, to prevent either party from claiming in ejectment contrary to it, though it will not pass the lands; (a) but such agreement may, it would seem, be revoked or modified by a subsequent parol agreement.

IN this case, which was submitted without argument, a verdict had been taken for the plaintiff, subject to the opinion of the court on these facts:

The lessor of the plaintiff owns lot No. 12, and the defendant lot No. 13, in Harrison's patent in Montgomery. About 40 years ago, the persons from whom the parties derive title employed a surveyor to run a division line between them, which was done, without any allowance for the variation of the needle from the year 1725, when the partition deeds of the patent were executed. Possessions, however, were taken, according to the line thus run, and have so continued to the present day. In the year 1789, two surveyors were employed by the lessor of the plaintiff and Jacob Klock (under whom the defendant comes in) to ascertain the boundary between them. The surveyors ran a line from the place of beginning, which was shown by the parties, making an allowance for the variation of the needle, from the date of the partition deeds. According to the line described by them, this line, thus struck, ran upon lot No. 13, and took part of it into lot No. 12. Jacob Klock, the then proprietor of lot No. 13, agreed to give up the possession to the lessor of the plaintiff, and to remove his fence, agreeably to this last line, so soon as a crop of

Keith, 4 Wend. 502; *Kinney v. Watts*, 14 Wend. 381; *Grannis v. Clark*, 8 Cow. 36; *Barnum v. Childs*, 1 Sandf. 58; *Cole v. Hawes*, 2 J. C. 203; *Vanderkan v. Vanderkan*, 11 J. R. 122; *Kent v. Welch*, 7 J. R. 258.

(a) See *Stuyvesant v. Dunham and Tompkins*, 9 Johns. Rep. 61, S. P.

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corn then on the ground, should be removed. After this agreement the lessor of the plaintiff told a witness, sworn on the part of the defendant, that it had been further agreed, between him and the defendant, that if a certain cause, at that time depending between John J.

*Klock and George Wills, should be decided in [*199] favor of Klock, then the defendant was to give up possession without a suit; but if Wills prevailed, the lessor of the plaintiff was to abandon his claim. No evidence was given what had been the issue of the action between Klock and Wills.

SPENCER, J. Three questions have been made on the above facts:

1. Whether the possessions, according to Jacob. G. Klock's line, for forty years, are or are not conclusive against the plaintiff's right of recovery in this action?(a)

2. Whether the agreement, in 1789, is or is not binding, it being by parol, and no part of it having been carried into execution, according to the survey then made?

3. Whether, if this last agreement was obligatory, it has or has not been rescinded by the subsequent agreement? and whether it was not incumbent on the plaintiff to entitle himself to a recovery, to have proved that the cause between Klock and Wills was decided, and had eventuated in favor of Klock?

The line run by Jacob G. Klock, forty years ago, was run at the instance of the then proprietors of lots No. 12 and 13, by a person acting under their mutual employ. This line was assented to at the time, and, independent of the subsequent acts of the parties, would, in my opinion, be conclusive upon them, after such a lapse of time, and possessions of such antiquity. It was competent to the parties to waive that line, and it appears that they did agree to waive it, and abide by the line run in 1789. An agreement by parol, to the settlement of a line, appears to

(a) See *Jackson v. Brown*, 1 *Caines' Rep.* 360, n. (a.)

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me effectual, and not liable to any objections on the score of the statute of frauds and perjuries. This agreement was, however, executory, and might itself be annulled by the parol agreement of the parties. The subsequent agreement placed the settlement of the line on the issue of the cause then depending; this agreement, I think, controlled and modified the former; hence, in my opinion, it was incumbent on the plaintiff to have shown that the suit between Klock and Wills had terminated in favor of the former; not having done this, I think the verdict should be set aside, and a nonsuit entered, pursuant to the stipulation of the parties.

THOMPSON, J. The submission to two surveyors, made by the lessor of the plaintiff and Jacob Klock, and their decision thereupon, cannot be considered as extending to the title of the land, or to have the operation of a [*200] conveyance. This *principle I think fully recognized in the case of *Jackson, ex dem. Morris, v. Rosser*, 3 East, 15. The title to lot No. 12, is admitted to be in the lessor of the plaintiff, and the submission was of a mere matter of fact, to ascertain where the line would run on actual survey, beginning at a place agreed on between the parties. I cannot consider this agreement in any way affected by the statute of frauds. But, admitting it to have been void in its origin, that cannot make void the acknowledgments of Klock, subsequent to the determination of the arbitrators. After the line had been ascertained, and he knew where it run, he agreed to give up the possession and move his fence. Here, was, then, a full and complete recognition of the extent and boundary of lot No. 12, to which it is admitted the lessor of the plaintiff has title. It is immaterial in what matter this line was ascertained, whether by a joint submission to one or more surveyors, or by an *ex parte* survey: it is enough that Klock, after it had been ascertained, recognized it as the true line. This would preclude him from denying the

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plaintiff's right, and must also have the same effect at respects the claim of the defendant, who hold under Klock. The defendant, however, sets up a subsequent agreement made between himself and the lessor of the plaintiff, which he contends is to do away the acts and acknowledgments of Klock. This agreement, as stated in the case, I do not think can in any way affect the plaintiff's right. If it is to have the operation of rescinding or waiving any right previously acquired, it was to have that effect on condition that a certain cause then depending, between John Klock and George Wills, should terminate in favor of the latter, and it was incumbent on the defendant to show that *that* suit had terminated favorably to Wills; nothing, however, appears to show how that cause had been decided, or whether any decision had taken place. The plaintiff had shown enough to entitle him to recover, and if anything had occurred to take away that right, it was incumbent on the defendant to show it. And besides, this second agreement is not free from difficulty, on the ground of the statute of frauds. The title to the premises is acknowledged to be in the lessor of the plaintiff, and if the second agreement is to have any operation, it is to divest him of that title. Neither agreement can have the operation of changing the title; the first must be viewed as a waiver, by Klock, of all benefit resulting from length of possession, and opening the question as to the *true line of [*201] division between the two lots, and the plaintiff's title to the premises in question is shown, independent of either agreement. I am therefore of opinion that he is entitled to recover.

LIVINGSTON, J. But for the new line run in 1789, and the parol agreement then made, it is not pretended that the plaintiff can recover; for the parties claiming these lots, having no less than forty years ago determined on the true line between them, by running the same, and having held their possessions accordingly ever since, no court would

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permit either of them, at this late day, to disturb the other. The defendant's possession is not only adverse to the lessor's claim, but commenced with his, or his ancestors' consent, and therefore ought not now to be questioned, merely on the ground that a mistake was made in the first survey. The defendant's title must be regarded as complete at the time of the second survey, and to continue so still, unless he or his devisor has done anything to defeat it. The agreement to abide by the line to be run in 1789, being by parol, was not binding on either. No memorandum of it was signed by the parties, or their agents. It is, therefore, within the act for the prevention of frauds and perjuries. If the defendant, or Klock, had removed his fence accordingly, it might have bound him, and those claiming under him, as to the extent of his possession; but never having carried the contract into effect, we cannot enforce a performance in this way, without violating a plain provision of the act. It is an agreement to put the lessor of the plaintiff in possession, which is equivalent to a sale of certain lands, then held by Klock, and to which he had a good title, provided they fell according to a line then to be run, in lot No. 12. I can perceive no difference between this condition, or proviso, and any other which the parties might have thought of. If Klock had promised to remove his fence so many feet, or, in other words, to give the lessor so many feet of his land, provided he would pay him a sum of money, or do any certain service, it would not have been obligatory, unless it had been in writing. Why, then, should *this* agreement be valid? If parties will confide in each other's word, where the law requires a more solemn form of contracting, they cannot complain if courts adhere to the positive directions of an act of the legislature, one object of which is to prevent parol contracts of this kind, or, at least, to put an end to judicial controversies about

[*202] them. The court of chancery, with *a view of preventing frauds, has gone far by its decisions, to ren-

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der this act a dead letter: but we are not sitting in that court, which would probably have done as well, not to depart from the literal provisions of the law, which are to explicit to be misunderstood, and to salutary not too be strictly enforced, As the defendant, then, has shown a perfect title to the premises, independent of the agreement in 1789, which not being reduced to writing, must be regarded as a nullity, I am of opinion, without considering the other points, that he must have judgment.[1]

Judgment of nonsuit.

SCHUYLER *against* RUSS.

On a written warranty that a negro is sound, parol proof is admissible to show that at the time of sale, the vendor informed the vendee of a defect. A warranty does not extend to defects which are visible.

CASE on a written warranty, upon the sale of a negro, that he was in good health, and in all respects sound.

At the trial, parol evidence was admitted to establish, that at the time of sale the plaintiff communicated to the defendant the defect in question, which was in the left arm, offering to show it, and that it was clearly visible, the arm being thin and crooked. It was without argument submitted to the court to determine whether this evidence was admissible or not?

[1] See *Jackson v. Defendorf*, 3 J. R. 269; *Jackson v. Luna*, 3 J. C. 109; different authorities in case, *Britter v. Phelps*, 17 Wend. 642; *Jackson v. McConnell*, 12 Wend. 421, 12 Wend. 127, 12 Wend. 130; see *Adams v. Rockwell*, 16 Wend. 285; *Van Wyck v. Wright*, 18 Wend. 157; *Bradstreet v. Platt*, 17 Wend. 44; *Jackson v. Woodruff*, 1 Cow. 276; *Dibble v. Rogers*, 13 Wend. 536; *Lamb v. Ooe*, 15 Wend. 642; *Jackson v. Van Antwerp*, 8 Cow. 273, 10 Wend. 109, 7 J. R. 283, 17 J. R. 29, 7 Cow. 723, 7 Cow. 701, 6 Wend. 467, 10 Wend. 104, 12 Wend. 421, 12 Wend. 127.

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Per Curiam. The proof was admissible. A warranty does not extend to things which, from the senses, may be discerned to be otherwise. Finch's Law, 189; 1 Salk. 211. Here the defect was not only visible, but the plaintiff told the defendant of it truly and explicitly, nay, even directed his attention particularly to it. The defect in question was not, therefore, within the purview of the contract, and the parol proof being admitted, (a) the verdict was agreeable to the weight of evidence and the justice of the case.

THE PEOPLE against POYLLON.

To warrant the granting a copy of an indictment, to ground an action for a malicious prosecution, the malice should appear from circumstances at the trial, declarations out of court, or certificate from the judge that he thinks it ought to be granted, which he may give though he be off the bench and has signed one which proves insufficient.

COLDEN, in order to ground an action for a malicious prosecution, moved for a copy of the indictment in this cause, on a certificate from the judge, before whom it had been tried, that the acquittal was satisfactory to the court.

Per Curiam. Every acquittal must be satisfactory. The malice ought to appear from what passed at [*208] the trial, or from *some circumstances, or declaration, out of court. The judge ought to say he thinks a copy ought to be granted.

Colden. The judge who presided at the trial is not now on the bench, and thinks he cannot now amend the certificate.

Per Curiam. That is no impediment. It may be done *nunc pro tunc*.

(a) See *Jackson v. Paterson*, 1 Calnes' Rep. 358, and note there.

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N. B. The certificate being altered according to the direction of the court, the copy was ordered accordingly.

Motion granted.

* * A counsellor, who has been a judge of this court, is entitled to a seat at the table with the attorney-general and officers of the people, or, as the English lawyers would express it, within the bar.

LAWRENCE *against* SEBOR.

If the acting partner in a concern of two, cause an insurance to be effected for the amount of his own share, and the policy state it to be on his account, but retain the general printed words of "whomsoever else it may concern," the insurance will be held to have been made on the joint account, if such appear to have been the intention of the assured, and to gather this intention, the letters of the assured may be resorted to, though they were never shown to the underwriter, who subscribed upon seeing instructions to insure only on the separate account of the acting partner. Under such circumstances, if the policy be for half the cargo, and on capture half be condemned, and half be acquitted, the assured can recover only a moiety of the sum insured.

THIS was an action on a policy of insurance for 5,000 dollars, on the cargo of the sloop Hope, at and from Guadaloupe to New York, for account of Richard M. Lawrence. Premium 3 1-2 per cent. The declaration, besides other counts, contained one averring the insurance to have been for account of the plaintiff; another averring it for account of the plaintiff and one Thomas T. Gault.

The facts, as agreed to in the case made, were these: The plaintiff residing in Guadaloupe, and Gault in St. Kitts, though not general partners in trade, were jointly interested in the cargo of the Hope. On the 23d of June, Lawrence wrote to Lawrence & Whitney, his correspondents in New York, directing insurance for the sum in the

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policy, but not specifying on whose particular account. The letter, however, stated that the plaintiff had given to Gault an order for the net proceeds of the sloop's outward cargo, and that he had drawn a bill on them for 3,000 dollars, which was to be charged to the shipment. But this letter was never shown nor communicated to the underwriters or insurance brokers, and the policy was effected on the following written order delivered to Hoyt & Tom. "Will you effect insurance on 5,000 dollars, cargo of the sloop Hope, from Guadaloupe to this port. She was to sail on or about the third of July. For account of Richard M. Lawrence, premium not to exceed 3 and 1-2 per cent." On the voyage the vessel was captured and carried into Mountserrat, where, on the 28th of [204] July, 1801, *Lawrence & Gault interposed a claim for the cargo, but, by the sentence, the portion of Gault was acquitted, and that of Lawrence condemned, with costs against both. Among the admiralty papers was a letter from the plaintiff ordering an additional insurance for 4,500 dollars on the cargo of the Hope; though knowledge of this never came to the underwriters or the brokers Hoyt & Tom.

On the 18th February, 1802, the abandonment was made.

At the trial of the cause a verdict was taken for the plaintiff, subject to the opinion of the court, whether the plaintiff could recover for a total, or a partial loss? or, whether he could recover at all?

On the part of the plaintiff it was insisted, that the insurance ensured to his own separate benefit.(a)

(a) Where the policy does contain the general words "whosoever else," &c., if the interest of the assured named, be only a several proportion of an undivided whole, and he have not authority to insure all, he will be entitled to recover to the full extent of the policy, if his interest warrant it. *Lawrence & Whitney v. Vanhorn & Clarkson*, 1 Caines' Rep. 276. So where the policy is in favor of a citizen or subject to whom the whole cargo belongs, under the general words, the subsequently acquired interest of a fellow citizen or subject will be protected. *Perchard v. Whitmore*, 2 Bos. & Pull. 155, n. (a.)

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Harison, for the plaintiff. Lawrence & Gault, as partners, were tenants in common; each possessing an undivided half of the general property. That the individual part of the plaintiff was intended to be protected by the insurance is plain. Of his interest only was the underwriter apprised; his name was inserted in the policy, and it is a settled rule that the written part of the instrument shall control the general words which are used. It can never be insisted that the letters of the plaintiff to his correspondents can influence the decision of this case. They were not communicated to the insurers. All that was disclosed was the order, and the only question is, whether the plaintiff had an insurable interest to the amount in the policy. There is nothing in the nature of joint property which prevents an exclusive insurance of one undivided moiety. Under the contract now before the court, Gault could not have recovered, had the vessel been carried into a French port, and his share condemned in a French tribunal. In *Page v. Fry*, 2 Bos. & Pull. 240, it was held that an averment of the plaintiff's being interested to the whole amount of the cargo insured, was supported by evidence showing he had some interest, though, previous to effecting the policy, he had sold the major part to another person. Surely, then, an averment of the insurance being on account of the plaintiff, is maintained by showing an undivided interest to the amount insured. Nothing can be urged against the abandonment. While the loss continues

Page v. Fry, *ibid.* 240. But where the instrument does not contain the above general words, it does not cover the interest of a joint owner not named. *Graves & Barnewall v. Boston Mar. Ins. Co.*, 2 Cranch, 419. Even a valued policy effected in the name of one partner only, does not extend to his associate, and if to the amount of the interest of the partner mentioned be underwritten by one underwriter, and the residue of the value specified by another, the policy is void as to the surplus beyond the interest of the assured who is named. *Dumas v. Jones*, 4 Tyng, 647. The report of which does not state whether the general words were retained in the policy or not, though it is probable they were not.

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total, it is never too late to abandon and recover for the whole. *Guerlain v. Shaw*, in the case of the *Grand Turk*.

Pendleton, contra. The policy extends to a cargo, [*205] the interests *in which are joint in every part.

Had half been saved from shipwreck, a moiety would have belonged to Gault. As half is acquitted, a moiety belongs to him; and the underwriter is entitled to the advantage of this, in the nature of salvage. Otherwise a policy on half would, in a case like this, cover and secure the whole; for, as half is restored, if half be also recovered, partners residing as these do are always wholly safe by insuring only a moiety. The letters prove the joint property was intended to be covered. An abandonment, to entitle to a total loss, must be made in the first instance. *Park*, 172, 181, 182.

Harrison, in reply. The principle of the English authorities is, that if, after lying by, the loss is changed to a partial or average loss, you shall not, by abandoning, set up a claim for a total loss; but this is inapplicable when the loss continues total; you must, in such a case, recover for a total loss, or you cannot recover anything. But whatever the British decisions may be, ours have settled the law in a different manner. The interest to be covered by this policy can be only that which the underwriter and underwritten contemplated. That only was the subject of contract. What, therefore, was contained in letters between the plaintiff and his correspondent, or how that interest is to be settled in account with Gault, is immaterial. What was the intent of the parties to the contract, as it appears from the written instructions? That, and that alone, is to govern.

LIVINGSTON, J. This is an attempt to recover as for a total loss, under a pretence that the assurance was effected for the plaintiff's separate interest, and was intended to

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cover nothing more than his proportion of the joint property. There can be no doubt that such an insurance may be made, and then, as in the case of *Lawrence & Whitney v. Vanhorn & Clarkson*, (Vol. 1. p. 276,) the partner, who thus insures his particular interest, will be permitted to recover accordingly; but there it appeared that Lawrence & Whitney had no right to insure for the other parties concerned in the voyage, and that it was well understood that the policy was to extend to their share only. But every thing forbids such a conclusion here. The plaintiff was at Gaudaloupe, and to him was committed the entire management of the voyage. He made the purchases; he loaded the vessel. To him it was left, and thence it became his duty to make insurances. The shipment was made on the joint account (and so expressed in *the [*206] bills of lading and invoices) of him and Gault, and amounted, with charges, to 9,922 dollars. On the 23rd of June, 1801, the plaintiff directs his agents in New-York to make insurance for 5,000 dollars. In this letter he speaks of Gault, and of his loading the sloop Hope on their joint account; and there is nothing in it from which it can be inferred that he intended to confine the insurance to his own proportion of the adventure. Five days after the plaintiff writes another letter, directing an additional insurance to be made on the same shipment, for 4,500 dollars, which would have covered all the property on board. After this, no doubt can be harbored of the plaintiff's intention. But it is said that these letters, not being communicated to the underwriters, ought not to be received to explain the meaning of the parties. This may generally be right; but if any doubt arise on the written contract, I think the acts of the assured, although not known to the assurers, may be examined to show that his intentions were different from what afterwards he pretends was the case. If he had designed to restrain the insurance to his interest in the cargo, it was easy to have used apt words for that purpose. If this had not been done, and there be any con-

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troversy as to its extent, and this has been occasioned by what may be deemed a neglect in the plaintiff himself, his acts, however desirous he may be to keep them from our view, must surely be good evidence, if they militate against the construction he now sets up, or if they have a tendency to show that it is foreign from what he intended at the time, and contrary to his own written instructions. But there is no necessity to travel out of the contract, which is always dangerous, to ascertain the meaning of the parties to it. The insurance is not only for Lawrence, but for "every other person to whom the property doth, may, or shall appertain, in part or in whole." After this we must do violence to the plain import of these terms, to confine this indemnity to the goods of Lawrence alone, or to the amount of his interest in the joint property. This is the usual way of making insurances on a joint interest for a particular voyage, where no general partnership exists. One of the concern is intrusted with the conduct of the voyage, and in making insurance. Ordinarily he discloses his own name only, but under such contract the other partners will be permitted to recover for a loss of their interest also. The words "for account of Richard M. Lawrence,"

being in writing, is of no moment, for as they do
[*207] not contradict, there is no reason *why they should

control, the printed clauses of the instrument. It may be be subjoined, that no one can doubt the plaintiff may charge Gault with his proportion of the premium of insurance, and that the latter may compel him to carry to his credit whatever is recovered in this suit. If so, it is another reason for regarding this, as it was most certainly intended to be, an insurance of the joint property. The French law has been referred to as settling this point in favor of the plaintiff; but on looking into Emerigon and Valin, we shall find them at variance. The former being of opinion that an assurance by one partner, without a specification of the interest he means to cover, is valid, only for his proportion of the adventure, while Valin, however, with several writers

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cited by him, consider it as extending to the whole cargo ; *quia id quod commune est, nostrum esse dicitur*. This is especially so, says Valin, if the insurance be made by the *chef de la societe*, or acting partner, as was the case here. It should be observed also, that Emerigon, in giving his opinion on a question which he admits to have been much agitated, makes use of expressions not only very guarded, but which cannot be applied to the present policy. If partnership effects are loaded, says he, for my account and that of others, an insurance which is made for "my sole account, (*pour mon compte seule*,) will only protect my interest, because nothing more has been covered. 1 Emer. 294 ; 2 Val. 34. But is that the case here? When the policy is as general as our language can make it, shall we call it an insurance "on the sole account" of Lawrence? Emerigon also admits that a judgment has been rendered in France, contrary to the opinion he entertains. Something was said of a misrepresentation as to the time of the vessel's sailing, but this objection was abandoned on the argument.

As to the lateness of the abandonment, this is a point I consider as settled by this court, in the case of *Earle v. Shaw*. It was there determined, that an abandonment, is never too late, provided the loss continue total to the time of making it.

Being, then, well satisfied that the plaintiff meant to insure the property of Gault as well as his own, and that the terms of the policy comport with this intention, he can recover a partial loss only. Judgment must therefore be entered for 366 dollars and 60 cents.

SPENCER and TOMPKINS, Justices, concurred.

KENT, Ch. J. Upon this case, the question is, whether the plaintiff shall recover the moiety of the sum insured, or the *whole? There is no dispute but [*208] that the plaintiff's individual interest was sufficient to cover the whole policy.

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The time of abandonment is not material, since, if the amount insured is to enure to the plaintiff, the loss remained total when the abandonment was made. This court has repeatedly decided that abandonment is not essential to enable the insured to recover a total loss, if the loss be actually total, and continue so to the bringing of the suit. *Earle v. Lefferts*; *Earle v. Shaw*, April, 1800; *Roget v. Thurston*, April, 1801; *Page v. Fry*, 2 Bos. & Pul. 240; 1 Caines' Rep. 284.

There can be no doubt, also, but that a partner has such an interest in the entirety of the cargo as to enable him separately to insure it; and that an averment that he had an interest in the property to the amount of the insurance is supported by proof of a partnership interest in him to that amount.

The important inquiry in the case is, what was the intent of the parties in the present case? Was the insurance intended for the separate interest of the plaintiff, or for the joint interest of him and Gault? if the latter, then it appears that only a moiety of the sum insured has been lost.

It does not appear that the plaintiff and Gault were general partners in business. It is rather to be intended from the case, that they were partners only in the particular shipment in question; and, although the printed part of the policy be in the usual form, yet the order to insure was for the account of the plaintiff, and the blank in the policy was filled up accordingly for account of the plaintiff; no other communication was made to the defendant but the order. I am therefore of opinion, arising from these material features in the case, that the evidence resulting from the contract itself must decide the question. It is there that we are to look for the intent. The plaintiff and Gault were special partners; the order limits the insurance to the plaintiff. His name alone is inserted in the policy. His share in the shipment equalled the amount of the insurance, and the joint interest of him and Gault was not brought into view in making the contract. The letter of

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the plaintiff was not communicated, nor do I think it would have been very material if it had, for it is too equivocal and indefinite to operate by way of explanation or control of the policy. This question has been much discussed and litigated by the French and Italian writers, and different opinions have been entertained on the subject, Valin, vol. 2, p. 34, however, concludes that if one insure as his own a thing in common between him and others, the policy is valid only for his portion, unless he was the principal of the firm. *Emerigon, vol. 1, p. 293, [*209] 294, 295, after stating the various opinions on the point, says that the general rule is, that each copartner is presumed not to insure but for himself; and if one insures, and the insurance be declared to be for his account, it will enure only to the extent of the interest of such partner.

This opinion is entitled to the more weight, considering that the general principles of the law of insurance are the same, in every country. I think, therefore, that the plaintiff is entitled to recover for a total loss, and that the verdict ought to stand.

THOMPSON, J. The only important question arising out of this case is, whether this insurance shall be considered as made for account of Richard M. Lawrence solely, or for account of Lawrence and Gault? If for the former, the verdict must stand; if for the latter, it must be reduced to \$366 and 60 cents. Several other points were raised by the defendant's counsel on the argument, but which were either abandoned or fall within the rules and principles heretofore settled in this court. The principal one was with respect to the abandonment, whether it was made in season, the loss having happened in June, 1801, and the abandonment not made until the February following. The rule on that subject I understand to be, that the assured may abandon at any time while the loss continues total. If that be so, the abandonment in the present instance was

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in season. With respect to the main question, I am inclined to think the plaintiff is entitled to recover as for a total loss. Admitting the plaintiff to have only a joint interest in the subject with Gault, there is no doubt but he could insure his own interest therein separately, and, under a general averment of interest in the entire thing insured, prove an interest in any aliquot part, and recover damages for the loss in proportion to such part. This point was settled in this court in the case of *Lawrence & Whitney v. Vanhorn & Clarkson*. The policy declares the insurance to be made for account of Richard M. Lawrence, and although the general printed words, "for whomsoever it may concern," might cover the interest of others, yet the written words serve in some measure as an index, by which to ascertain the intention and understanding of the parties. In the present case it must manifestly have been the understanding of the defendant and of the broker who effected the policy, that the insurance was on account of Richard M. Lawrence only. The order for insurance given [*210] by Lawrence and Whitney, the *plaintiff's agents, to the brokers, were *explicit* that the insurance was to be for account of Richard M. Lawrence. The letters written by the plaintiff to his agents, I think, are not entitled to much weight; for, from the one which they received, it may be doubtful whether it contained directions to insure on the joint account of Lawrence and Gault, or on the separate account of Lawrence. The one which never came to hand ought certainly to have no influence on the question. Whatever intimations were given by the plaintiff to his agents, with respect to Gault's interest in the cargo, they never came to the knowledge of the underwriter. The representation made to the defendant was, that the insurance was for account of Richard M. Lawrence; and if, in any state of things, it would have been for the benefit of the underwriter to have confined the interest in cargo to Lawrence only, he might have urged, with great force and propriety, that such was the understanding of

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the parties at the time the policy was effected. The situations of Lawrence and Gault were different, and should an attempt have been made to recover, under different circumstances, on the joint interest of Lawrence and Gault, and the risk had been increased by the concern of Gault, in the subject insured, the underwriter would have had good right to urge the representation as a ground of fraud to avoid the policy. I think, from the policy itself, and from the understanding of the immediate contracting parties, it is clearly to be inferred that the insurance was intended for account of Richard M. Lawrence only. His interest is sufficient to cover the sum insured, and nothing appears in the case to induce a suspicion of fraud, or that he has, or is to derive any benefit from that part of the cargo restored to Gault. I am therefore of opinion that the plaintiff ought to have judgment for the 639 dollars and 34 cents.

Judgment for 366 dollars and sixty cents only.

JACKSON, *ex dem.* VAN SLYCK and others, *against*
VEDDER.

The line run by old Isaac Vroman, is the true line of the Van Slyck patent.
Original locations of patents are of great weight in settling boundaries.

THIS was an action of ejectment for lands in Montgomery, the sole question in which was, as to the point of beginning in the Van Slyck patent, granted in 1716. A verdict having been given for the defendant, application was made for a new trial, as being contrary to evidence, the whole of *which, as applicable to [*211] the question, is detailed in the opinion, which is given without either case or argument, the whole contest being a matter of mere boundary.

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THOMPSON, J. delivered the opinion of the court. The principal question that arises in the case is, as to the place of beginning in the Van Slyck patent. Whether it be at the extreme point of a certain flat, on the north side of the Mohawk River, or at the river, near a certain ancient marked elm tree? If at the former, the plaintiff must prevail; if at the latter, the defendant must retain the verdict. The description of this place in the patent is as follows: "Beginning by the westernmost end of a flat, that lies over against castle Tarighioris, by three small islands, which lie in the river, and from thence," &c. We think it is clear, from the testimony in the cause, that the natural termination in the flat referred to is at the place set up by plaintiff; and was the patent explicit that the beginning was at the westernmost end of the flat, without any other description, and no location had been made, we should suppose there was an end of the question. But, as the description is somewhat vague and indefinite, all the objects not corresponding, the acts of the parties ought to have great weight in controlling the construction, and we think it is one of those cases where the first location under the patent ought to govern and conclude the parties: this patent is dated in the year 1716. The precise period of the first survey does not appear. Lawrence Vroman, the first witness examined on the part of the plaintiff, says, that, in the year 1788, the Van Slycks showed him an elm tree, as a line run by the witness's father for them, at the time of the division of their patent; but, at the same time, said they claimed beyond it. This claim, however, appears to have been at variance with their acts, and is entitled to but little weight. Adam Countryman, another of the plaintiff's witnesses, speaks of a possession of one Ehel, as far back as seventy years, and that there was then a division fence between him and the Van Slycks, towards the upper end of the flats; there were some flats north of this fence improved by Ehel; this fence was nearly half way between the mill of the Van Slycks and Ehel's house; and

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from the testimony of Hendrick Fry, it appears that the fence corresponds with the line of the elm tree; but he says the Van Slycks told him Ehel held under them. This was the declaration of the party in his own favor, and must be rejected. This same witness says, that "George Eacker held under the Harrison patent, [*212] which is the adjoining patent, and that before the war, his clearing extended as far as the elm tree; and that a man by the name of Kelly held an old possession on the south side, under the Van Slycks, corresponding with the line of the elm tree. Thus far the testimony on the part of the plaintiff goes to show a recognition of this as the line adopted by the Van Slycks, and the testimony of S. Dygert, on the part of the defendant, confirms and establishes this point beyond dispute. He says he has known this elm tree, as a marked tree, upwards of six and forty years, and has always understood that it was marked for the division line between the Harrison and Van Slyck patents. That Harmanus Van Slyck, who, it was admitted by the counsel, was the grandfather of the lessors of the plaintiff, showed him this tree as standing on the division line. He also says that Eacker's and Ehel's possessions, before spoken of, are the same; the former purchased of the latter, and that Eacker held under the Harrison patent. That there is a fence on the line corresponding with the elm tree, nearly the whole length of Harrison's patent, and the possessions held accordingly, some of them ancient possessions, thirty or forty years old. He was present when this line was run by old Isaac Vroman, which he believes was before the war; has seen it run at other times, and that the fences corresponded with it. We think, therefore, it is evident, from the whole testimony offered on the trial, that the line corresponding with the elm tree was the one originally set up and recognized by the Van Slycks as the true line of their patent. The possessions generally appear to correspond with this line, and the description in the patent being rather doubtful, it is but reasonable and just that the

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Van Slyck claim should be restricted to the original location. We lay out of view the conversation said to have taken place between Crone, the former possessor of the premises in question, and one Nicolls; the very questions and answers imply a dispute relative to the title, and can by no means be considered as a recognition by Crone of Van Slyck's title, but only as a prudent precaution on his part to secure the buildings on any event, and the offer to buy, if made as stated, must be viewed in a light of a purchase of peace. The credit due to the witnesses, and the circumstances detailed by them on the trial, were proper subjects for the consideration and determination of the jury. We cannot say that injustice has been [*213] done; a fair trial has been *had, and there appears no prospect of any further light being thrown on the subject by another examination. Under these circumstances, we think a new trial ought not to be granted.

New trial refused.

THE PEOPLE *against* S. and J. WRIGHT.

A justice of the peace cannot grant a warrant to apprehend a criminal for an offence committed in another state.

THE defendants were in the custody of the sheriff, on very heavy civil process, and while thus detained, a warrant was issued against them, by one of the special justices for the city of New York, grounded on an authenticated copy of an indictment found against them in Massachusetts, for a fraud alleged to have been committed there.

After, (District-Attorney,) on these facts, moved to have them taken out of the custody of the sheriff and committed to bridewell.

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Per Curiam. We cannot do it. We have no jurisdiction over offences committed in other states. The constitution points out a mode by which offenders, flying from one state into another, may be claimed. They must be demanded by the executive authority of the state from which they fled. The prisoners must be remanded.

Motion denied.

VAN HORNE *against* PETRIE and others.

Under the act concerning costs, a plaintiff must recover above fifty dollars damages, exclusive of the six cents or other costs, to entitle him, in the supreme court, to costs of increase.

The word "recover," in the statute, means what shall be assessed as damages *eo nomine*

IN this case the jury found a verdict in favor of the plaintiff, for 50 dollars damages and six cents costs. It was submitted to the court whether he was not entitled to his costs of increase.

Per Curiam. We think he is not. The act declares that if the plaintiff "shall not recover above the sum of fifty dollars, besides costs, he shall not recover any costs, but shall pay costs to the defendant." The recovery here spoken of means the damages assessed by the jury, *eo nomine*, exclusive of the costs which they may arbitrarily find. The finding of a jury as to costs, has nothing to do with those which are to be allowed in taxation, otherwise they might entirely control the statute on this subject; for, in many cases, where they could not, in conscience, give more than a cent in damages to the plaintiff, they might think it hard on him not to recover costs of increase, and *therefore, to entitle him to them, they might find [*214] a verdict for one cent damages and seventy dollars

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costs; this would hardly be allowed. If the verdict were recorded in this form, the court would not hesitate, in rendering judgment on it, to reject the finding, as to the costs, as altogether nugatory, and not within the province of a jury; or, if they gave judgment for the costs thus found, the damages being under fifty dollars, they would (and such is our judgment here) order the plaintiff to pay costs to the defendant.

SEAMAN against BAILEY.

R. P. on a recovery in the common pleas for 25 dollars.

THIS case, which came before the court on a writ of error to the common pleas of Orange county, was, like the former, a question of costs. The plaintiff, who was the plaintiff below, had recovered 25 dollars in the inferior court, and the judges there had ordered costs to the defendant.

Jones contended they ought to have been awarded to the plaintiff. That the word "recover" meant everything for which the judgment would be rendered. Therefore, as that would necessarily include the damages assessed, and the costs also, the plaintiff would actually recover more than 25 dollars, and thus, on the plain words of the act, be entitled to receive costs and not to pay them. A distinction, he said, was to be taken between the wording (sec. 4) of the statute relating to the supreme court, and that of the common pleas, (sec. 5.) In the former, the expressions are "fifty dollars besides costs." In the latter they are "shall not recover above the sum of fifty dollars." Therefore, though the plaintiff in the last antecedent case was held liable to pay to the defendant, it would not be a contradiction

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to that determination, now to decide that the defendant was bound to pay to the plaintiff.

Per Curiam. The plaintiff below, who is also plaintiff here, had his damages assessed by a jury of inquiry, over and above his costs and charges, to twenty-five dollars, and for those costs and charges to six cents. On this inquisition, the court of common pleas rendered judgment, that "the plaintiff recover against the defendant his damages aforesaid, by the said inquisition above found, being twenty-five dollars and six cents; and *further, [*215] that the plaintiff pay to the defendant eleven dollars and nine cents for his costs."

This judgment the plaintiff insists on is erroneous, inasmuch as it awards costs to the defendant, when he ought to have paid costs to the plaintiff. For the reasons assigned in the preceding case of *Van Horne v. Petrie and others*, we think the judgment below was right. The fifth section of "the act to reduce certain laws concerning costs into one statute," 1 Rev. Laws, p. 580, enacts, that if in any action of the nature of the present, brought in any court of common pleas, "the plaintiff shall not recover above the sum of twenty-five dollars, he shall not recover any costs, but shall pay costs to the defendant." In our opinion the plaintiff did not, within the meaning of this section, recover more than twenty-five dollars, notwithstanding the jury gave him six cents costs, nor does the manner of rendering judgment, which is in fact only for the damages assessed by the jury, make any difference, although the attorney, in making up the record, has in a parenthesis, in a way not very usual, stated these damages (very incorrectly by the by) to amount to twenty-five dollars and six cents. As, in the case just determined, we take no notice of the costs found by the jury, but consider the sum assessed as damages, as the recovery intended by the law, the judgment below must therefore be affirmed.

Judgment of affirmance.

Jackson v. Whitford.

JACKSON *ex dem.* BLEECKER, *against* WHITFORD.

A tenant deriving title under a lease cannot dispute his landlord's right by showing the premises are in another patent.

EJECTMENT for lands in Saratoga. The plaintiff proved a lease of part of the 18th lot in the 16th allotment of the grand division of the Saratoga patent, by John R. Bleecker (from whom his lessor established her title) to one John Skidmore, who entered and held under it, paying rent as a tenant. That Skidmore sold the lease to one Danforth, who died leaving two sons, who divided the farm between themselves, acknowledging, however, the title of Bleecker. That from one of these sons the defendant acquired possession in exchange for another farm. The defendant admitted he thus came into the lands, but offered to prove they were no part of Saratoga patent, being actually out of its boundaries. This testimony being overruled, a verdict was found for the plaintiff, to set aside which the present application was made.

[*216] * *Woodworth*, (Attorney-General,) for the defendant. We admit that a tenant cannot controvert the title of his landlord, but we contend that when the premises are not included in the lease, he can show that circumstance. If, however, this should be against us, we insist on our right to the usual notice to quit.

Henry, contra, was stopped by the court.

KENT, Ch. J. The want of notice to quit was not alleged at the trial; it is too late, therefore, to urge it now, because had it been urged, the plaintiff might have been ready to establish it. The case does not mention it; we may, therefore, intend it was proved. As to the main ground, the defendant cannot be permitted to question his

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landlord's title. This is a settled rule. He must give up to his landlord the possession he had from him. The premises were received as part of lot 18, and the tenant cannot now, as against his lord, say they are not so. The plaintiff may have possessed the lot long enough to shut out all adverse claims, and to gain himself a title by his possession only. The defendant can take nothing by his motion.[1]

Motion denied.

HALLOCK *against* T. AND J. POWELL.

A count in *assumpsit*, and one on a warranty on a sale, may be joined, and not guilty pleaded to both. If not guilty be pleaded to the warranty, and *non-assumpsit* to the other count, and the plaintiff take judgment on the *assumpsit*, and enter a *nolle prosequi* on the warranty, the misjoinder is not moveable in arrest of judgment.

THIS was an action on the warranty(a) of the sale of a horse. The declaration contained two counts: one on the warranty, the other in *assumpsit*.(b) To these the defendants pleaded not guilty, and *non assumpserunt*.

At the trial the plaintiff took a verdict on the count in *assumpsit*; but as to the first, entered a *nolle prosequi*, which was inserted on the *postea*, and also on the record.

The defendants applied, on a case submitted, to arrest the judgment, because two incompatible counts were joined in the declaration.

[1] See *Jackson ex dem. Low v. Reynolds*, 1 Cal. R. 454; *Jackson ex dem. Van Alen v. Vosburgh*, 7 J. R. 186; *Brant ex dem. Cuyler v. Livermore*, 10 J. R. 358.

(a) See *Stuart v. Wilkins*, Doug. 18, that the proper action is *assumpsit* on the warranty.

(b) In *The Executors of Ewartson v. Miles*, 6 Johns. Rep. 142, Van Ness, J., says both the counts were for a deceit. Spencer, J., in the same cause, p. 143, says one count was on an *assumpsit*, the other on a warranty.

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LEFFINGSTON, J. delivered the opinion of the court. The motion cannot be granted. Great strictness was formerly observed in preventing two distinct causes of action being joined in the same declaration. Many of the old cases, however, have been overruled, and are not now regarded as law. But notwithstanding some relaxation in this respect, courts seem averse to permitting actions for [*217] torts to be blended with those *on contracts—either because they required different pleas, or because the judgments are not the same. These are the reasons generally assigned. It may seem arrogant, after they have been so often repeated, to say there is not much weight in either of them. A plaintiff may declare in one suit, on twenty different notes or simple contracts, to every one of which there may be a distinct defence. To one may be alleged duress—to another infancy—coverture to another—usury to a fourth, and so on. On some of the counts there may be judgment for the plaintiff, and on others for the defendant. These variety of pleas must all be tried at once, and be spread on one record, but still no objections on that account are listened to, if all the counts are laid “*quasi ex contractu*.” Every suit, therefore, should have been confined to a single cause of action, or some better reason assigned for erecting an insurmountable barrier between torts and contracts.^(a) It is as easy to try an assault and battery, on not guilty pleaded, and the validity of a promissory note, on *non assumpsit*, in one action, as it is in any other two pleas where both the counts are on contract. Nor do we see any difficulty in rendering as appropriate a judgment in one case as the other. If there be a verdict in favor of the plaintiff, on the count as well for the battery, as on the plea of *non assumpsit*, and separate damages,

(a) The rule as now settled in the English courts seems to be, that where the injury arises out of a breach of contract, the action, though laid in tort, shall be deemed to arise *ex contractu*. See *Powell v. Layton*, 2 New Rep. 265; *Mus v. Roberts*, *ibid.* 454, affirmed on a writ of error, 12 East, 33, and *Wool v. King*, *ibid.* 482, overruling that of *Good v. Burbridge*, 3 East, 62.

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as there might be, where would be the difficulty of entering the same on the roll according to the finding of the jury, of applying them to the proper counts, and of rendering a judgment "that the plaintiff recover against the defendant his said damages, by the jury aforesaid in form aforesaid assessed, as also his costs, &c. which damages and costs amount in the whole to so much." However practicable this may be, (and there is no more difficulty in it than what may arise every day from joining several causes of action of the same kind in one declaration;) we are not for departing from established precedents. Although far from being satisfied with its reason, the practice itself is salutary. Joining several causes of action in one writ must perplex jurors, and create more or less confusion on the record. But whatever may be the reason for separating torts and contracts, these counts do not militate against the rule which has been adopted in England, which is, "that two counts may be joined in the same declaration when their nature is the same, so that the same plea may be pleaded, and the same judgment given." (a) *Mast v. Goodson*, Black. 848. *Brown v. Dixon*, 1 D. & E. 274. *Dixon v. Clifton*, 2 Wils. 819. In the first of these *cases there [*218] were two counts, one on a special agreement (or contract) by the defendant, for a valuable consideration, to permit the plaintiff to land his goods on the defendant's close: the breach assigned was an obstruction in landing the goods; the other was in trover for goods and coal. There was a general verdict; and the court were unanimous that these causes being both founded in tort, notwithstanding the form of declaring, might well be joined. It is true that the defendant had pleaded *not guilty* to both counts: and so he might have done here; for the plea of

(a) Mr. Tidd says this rule is not correct. That the result of the cases is, where the process, or plea and judgment, are different, the actions cannot be joined. Tidd's K. B. 12, n. (w) Mansfield, Ch. J. of C. B., says the propriety of joining "depends not on the judgment only but on the form of the plea also." 2 New Rep. 274.

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not guilty was not to his agreement, or undertaking, but to the charge of obstructing the plaintiff in violation of it. So here, the breach assigned is, "the defendants' deceit in delivering a diseased horse, after undertaking to deliver one that was sound." This was as much a misfeasance and a tort as obstructing the plaintiff in the use of a close, after having promised to let him enjoy it, and might have been answered, or put in issue, by not guilty.

In the case cited from D. & E. the plaintiff had, to a count for the wrongful conversion of a spaniel, joined one for a breach of promise in not returning him; and on demurrer the court held the declaration good, because not guilty might be pleaded to the whole. In the case in Wilson, a count for misfeasance in not delivering certain malt, and one in trover, were permitted to be joined. So you may declare against a carrier on the custom of the realm and in trover.

There are some cases which seem opposed to these which have been cited, and particularly one in *Benninagage v. Ralphson*, 2 Show. 250, pl. 256. Where the plaintiff declared, as here, on an *assumpsit* and on a warranty, and it was adjudged they could not be joined; but modern practice appears more reasonable, and is sufficiently established to form a precedent. This motion, too, is made after the merits have been fairly tried, and a verdict been found for the plaintiff, which it is our duty to support if possible.

Upon the whole, as the *gist* of the action in both counts was a deceit, or misfeasance, in delivering the plaintiff a distempered horse, and as not guilty might have been pleaded to both, the plaintiff is within the rule that has been mentioned, and is entitled to judgment.

The plaintiff having taken a verdict on the second count, the regular way will be to enter one for the defendant on the other, as it is done in all cases where there is a different finding on different counts. I will only sub-
[*219] join that there will *be no inconsistency in perfecting the roll in this way, notwithstanding the plea

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of guilty to one of the counts, which shows as has already been remarked, that the perplexity arising from the pleas not being the same, cannot be a good reason for not permitting actions for wrongs to be joined with those on contract.[1]

Motion denied.

SEAGAR *against* SLIGERLAND.

A father cannot maintain an action for debauching his daughter, *per quod servitium amisit*, if it appear that he connived at the intercourse with his daughter, nor can he avail himself of a custom of the country for persons courting to sleep together.

THIS was an action for debauching the plaintiff's daughter, whereby he lost her service, and was put to expense in her lying in, &c.

The defendant applied, on a case made and submitted without argument, to set aside the verdict, which was for 450 dollars, as being contrary to law, against evidence, and because the damages were excessive.

At the trial the plaintiff's principal witness was his own daughter. She testified that the defendant, after a promise of marriage, frequently lay with her, and at length got her with child. That long before this period, the plaintiff and his wife knew that she and the defendant slept together at their house, without forbidding or discountenancing the intercourse. That before her pregnancy, her mother, in particular, had twice seen them in bed together.

Per Curiam. From the summary of the testimony we are constrained to say, there ought to have been a verdict for the defendant. In actions of this nature, the daughter

[1] See *Case v. Boughton*, 11 Wend. 106.

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is supposed to be violated with force, against the will and consent of the father. It is then, and then only, that he is entitled to compensation for the loss of her service. But when he consents or connives at the criminal intercourse, he seeks with very ill grace a retribution in damages. *Volenti non fit injuria*. If he be not *particeps criminis*, he is something very like it. His assurance in coming here for redress can be equalled only by the indifference with which he submitted to the sacrifice of his daughter's chastity. We lay out of view the custom which it is agreed prevails in that part of the country, for young people, who are courting, to sleep together; nor can we conceive why this custom has been pressed into the plaintiff's service. If it furnishes an excuse for his carelessness, or his daughter's indiscretion, it is some apology also for the de-

[*220] fendant. *At any rate, parents who countenance, or take no pains to abolish, at least within their own walls, a practice so indecorous or dangerous, have no right to complain, or ask satisfaction for consequences which must so naturally follow from it. Nor is it an excuse for the parent to say that promises of marriage had been exchanged. If, under such engagements, he thought there was no harm in permitting what nothing but wedlock itself should have sanctioned, he knew the risk to which his daughter was exposed. These vows might be broken, or the young lady, as there is too much reason to believe was the case here, might, by her own indiscreet behavior, justify the lover in transferring his affections to some other object. On the daughter's behavior, however, it is not necessary now to dwell, as we are not showing what measure of damages(a) would have been just, but that none at all ought to have been given. This will more properly become a subject of inquiry if she shall think

(a) Where the action is maintainable, the father may recover damages for the injury, "in losing the comfort of his child, in whose virtue he can feel no consolation, and as the parent of other children whose morals may be corrupted by her example." *Bedford v. M'Kew*, 3 Esp. Rep. 119. So if the

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proper to bring an action for a breach of the marriage promise. The father's conduct is more immediately in question in this suit; and as that was in the highest degree exceptionable, as he consented to if he did not encourage, knew of and took no measures to prevent the connections which has produced this action, we think it cannot be maintained. The verdict is, therefore, against law, and a new trial must be had. The judge having refused to nonsuit the plaintiff, as he ought to have done, the costs of the former trial must abide the event of the suit.

New trial.

 FARRINGTON against RENNIE.

If the plaintiff in trespass recover in this court under 50 dollars, he will not be entitled to costs, unless the judge certify that the freehold came in question.

IN trespass *de bonis asportatis* the defendant pleaded not guilty, and gave notice that the *locus in quo* was his freehold.

At the trial 17 dollars only were recovered. The plaintiff, however, contended he was entitled to full costs, as it appeared from the notice that the freehold had come in question. 1 Rev. Laws, 529.

Per Curiam. By the fourth section of the "act to reduce certain laws concerning costs, into one statute," it is enacted, that "if, in any personal action prosecuted in this

action be by a person who stands in *loco parentis*, has adopted and shelters under his roof, the damages may be augmented beyond the mere service, to compensate for the injury done to the object on whom he has thus placed his affection. *Edmonson v. Machell*, 2 D. & R. 4; *Irwin v. Dearman*, 11 East, 23.

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court, the plaintiff shall not recover *above* the sum of fifty dollars *besides costs*, he shall not recover any costs, but shall pay costs to the defendant to be taxed." "Provided, however, that nothing therein contained "shall [*221] *extend to any action where the freehold or title to land *shall* in anywise come in question." In this case, we think it does not appear that it did.

Where *liberum tenementum* is put on the record in form of a plea, it does not necessarily follow that the title will come in question. The plaintiff by his replication may admit that fact, and yet have a right to recover. Still less inevitable is this conclusion, where, subjoined to the plea, is a notice of the kind given, to which a party cannot reply, and the matter of which may be altogether abandoned or not insisted on at the trial. Upon the whole, instead of looking at the pleadings, and relying on them how costs in these actions are to be disposed of, we think it best in future, in all cases of trial, to require a certificate of the judge who presided, "that the freehold, or title to lands and tenements, did come in question," as the best and only evidence of costs being due under this proviso. Although the act be silent as to any certificate, we think it a mode of ascertaining the fact, the most free of objection, and not so liable to mistakes as conclusions drawn from a reference to the pleadings. In this case, we are of opinion that the plaintiff pay costs to the defendant.

Costs to the defendant.

HOUGH *against* STOVER.

A motion in arrest is a non-enumerated motion, and the reasons need not be specified.

It was ruled in this case at the last term, that an application in arrest of judgment was a non-enumerated motion.

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and that the motion need not specify the reasons; because, as they are on the face of the record, they must necessarily appear to the adverse party.(a)

STALEY against BARHITE AND WIFE.

If in *assumpsit*, by husband and wife, it be not shown why the wife is joined, it will be fatal on error. So if a jury be delivered in charge of a person not a constable.

IN ERROR, on *certiorari*.

Ostrander submitted that the judgment obtained against the now plaintiff, by the present defendants, ought to be reversed: 1. Because the wife was joined in the action below, which was *assumpsit*, without showing how she had any interest; 2. Because it appeared from the record, that a person not a constable was sworn to attend the jury; and for these reasons the judgment was accordingly reversed.

***SUCKLEY against DELAFIELD.**

Under a warranty against seizure, on account of illicit trade, the underwriter is liable for a loss by illicit trade barratrously carried on by the master. A representation, in time of peace, that a vessel shall sail in ballast, is substantially complied with, though she sail with a trunk of merchandize and ten barrels of gunpowder, laden on board without the knowledge of the owner.

On a policy of insurance, upon the body of the ship *Ann*, effected on the following representation:

(a) Since the decision in the text, motions in arrest of judgment have been classed among enumerated motions, and are entitled to a preference to other causes on the calendar. Rule of Saturday 18th February, 1809.

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"The Ann will sail from hence in a few days, for the West Indies, in ballast." The clause relating to contraband was stricken out, but that concerning illicit trade was retained.

In the first count of the declaration, the loss was alleged to have taken place by seizure, by the French government, in St. Domingo. In the second it was stated to have arisen from the barratry of the master. The circumstances, as they appeared at the trial, were these :

The vessel had neither invoice nor manifest of cargo, none having been shipped on board with the knowledge of the plaintiff, who was owner of the vessel. The master, however, had taken it on account of Grellet & Bell, of New York, a trunk of shoes, which he introduced into the ship as his own baggage ; and, in addition to this, he privately conveyed into the Ann 10 barrels of gunpowder, which, with the assistance of the mate, he stowed under the ballast. Of the receipt on board of these articles, no entry whatsoever was made in the log-book. Thus circumstanced, the vessel sailed for St. Domingo, arrived there on the 28th of January, 1801 ; and, the agent of the plaintiff having discovered the shipment of the shoes and gunpowder, she was, together with these articles, duly entered at the custom-house, at Cape Frangoise ; but General Le Clerc having arrived there on the 4th of February following, it became necessary to make a new entry, which was accordingly done. Soon after this, the vessel was seized by his directions, and confiscated for importing powder, contrary to the third article of the *arret* of the 16th of February. The judge charged, that the captain's conduct, in secretly taking on board the powder, without the knowledge of the owner, was barratry ; and, although the trunk of shoes was on board, yet that did not to him appear to have increased the risk of the voyage, nor was it a material circumstance. On this, the jury found a verdict for a total loss ; to set aside which, and grant a new trial, the defendant now applied on the following grounds : 1.

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Because the representation that the ship would sail in ballast was material and not true; 2. That the condemnation was for illicit trade; the warranty, therefore, in that respect, broken; 3. *That the act of the agent [*223] of the owners, entering the powder, was, in law, the act of the plaintiff.

Pendleton, for the defendant. The representation of the state in which the vessel was to sail, we consider as material. Independent of the powder, which might be considered as within the representation, there was some cargo on board. It is for the court to determine whether its amount is to be taken into consideration, and this will depend upon the idea they will entertain of the meaning of the terms, sailing in ballast. The object was to show there would be no danger of capture or detention from having a cargo on board, and to induce a calculation of the premium, on the principle that there would be nothing on board to tempt a cruiser, to seize. It does not appear that the trunk was shipped for the benefit of the master. This, therefore, cannot be barratry. On the second point, there can be no doubt; for, allowing the insurer to be liable for barratry, it must be barratry in something not within that which he is warranted against. It is plain the condemnation was for illicit trade. On this point the sentence is conclusive evidence, because pronounced by a competent tribunal, on a matter of municipal law. This is very different from admiralty sentences, deciding on the law of nations. Here there was a condemnation for barratry in an illicit trade, from loss in which very trade the insurer is warranted free. The third point needs no argument. The act of an agent, respecting the subject matter of his agency, is clearly the act of his principal. The entry, therefore, of the vessel was an adoption of the captain's conduct in carrying out the gunpowder.[1]

[1] See *Ely v. Hallett*, *ante*, and cases cited there.

Sockley v. Delafield.

Hoffman, contra, was stopped by the court.

KENT, Ch. J. We are of opinion the representation of sailing in ballast, was merely stating the vessel would not be exposed to the sea perils attending a loaded ship. It was made in a time of profound peace, and, in the present instance, was substantially performed. We have no doubt on the conduct of the master. It was certainly barratry, and the plaintiff must have judgment.(a)

New trial denied.

(a) Where contraband of war and lawful goods are shipped in the same bottom, with the knowledge of the assurer and assured, the warranty against illicit trade, &c., in a policy on the lawful goods, will apply only to the goods insured. *Brown v. Shaw*, 1 Caines' Rep. 489. To constitute a breach of the warranty in this clause, a condemnation on pretence of illicit trade, &c., is not enough: there must, it would seem, be a trading in fact, (*Johnston v. Weir & Ludlow*, 1 Caines' Ca. in Er. xxix. S. C., confirmed by 2 Johns. Ca. 481, giving the sentence of the court of admiralty at full length, the decision in error *verbatim* as in Caines'), and that followed by a seizure; (*Graham v. Penn. Ins. Co.*, 1 Cond. Mar. 346, a. (n) therefore a loss by seizure only, in a port of necessity, after being refused entry at that of destination, is not a loss within the warranty, (*Suydam & Wyckoff v. Mar. Ins. Co.*, 1 Johns. Rep. 181.) nor a capture under the Berlin decree for touching at a port in England. *Mumford v. Phoenix Ins. Co.*, 7 Johns. Rep. 449. But from a loss by any trading actually illicit, though innocently carried on, the underwriter is exonerated. As where a vessel commenced her loading under a permission by proclamation to take in a cargo not allowed to be exported or received otherwise, but was taken and condemned in consequence of continuing to lade and sailing after promulgation of an order revoking the license, the underwriter was held to be discharged, notwithstanding the lading and sailing were under a mistaken opinion of the commander-in-chief at the port of departure, that the trade was lawful. *Tucker v. Julel*, 1 Johns. Rep. 20. In a policy on *commissions* on lawful goods, containing the above warranty, it will apply only to those lawful goods upon which the commissions are to arise, though the insurer know not of contraband of war being on board, and the assured be assignee of the contraband articles. *De Peyster & Chariton v. Gardner*, 1 Caines' Rep. 492.

Watson v. Delafield.

*J. and S. WATSON *against* DELAFIELD: [*224]

If an assured, having written several letters ordering insurance, and transmitted them by different conveyances, arrive, after a knowledge of a loss, with one of the letters, at a port from whence it is forwarded by the post, he is bound to countermand the order by the same mail. On a motion to set aside a verdict, as not warranted by the facts, the court will not receive testimony or affidavits to supply what was deficient at the trial, in order to prevent a new investigation, unless the testimony be incontrovertible in its nature, such as a record, or the like. If the testimony be for the purpose of affording further inquiry, the court will receive it.

ON a policy of insurance, on 13,600 dollars, in doubloons, at and from Kingston in Jamaica to Baltimore.

The case and arguments embraced a variety of points and facts, but as the decision turned on one principle only, it would be useless to detail more of either than is applicable to the judgment. From the evidence it appeared that Andreas Finkin, on whose account the insurance was affected, wrote, on the 16th of August, 1801, a letter from Kingston, addressed to Mr. Stouffer, of Baltimore, his partner in this transaction, desiring insurance against all risks, to be effected on eight hundred and fifty doubloons on board the Harriet and Ann, Rhodes master from Jamaica to Baltimore. Duplicates and triplicates of this letter were made, but by what vessel they were sent, or through what post-office they passed, was not shown, though it was proved they both arrived in Baltimore on the 7th of October following. As to the original, that was put on board a vessel called the friends, bound to Boston. After this Finkin embarked, with his money, in the Harriet and Ann, for Baltimore, as insured, but she, while on her passage, sprunk a leak, in consequence of which she was abandoned by Finkin and her crew, all of whom were taken on board a ship named the Lucy, leaving the Harriet and Ann water-logged, so that she, with the money on board, in all probability foundered in a gale of wind,

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which shortly after came on. Soon after being taken in by the Lucy, Finkin was heard to say "he was afraid the Harriet and Ann was not insured, though he had twice written to Mr. Stouffer for that purpose." A few days after this they fell in with the Friends, beating up for Norfolk, in distress, and the Lucy being destined to New England, Finkin and Rhodes quitted her for the Friends, in which they arrived, on the 30th of September, at Norfolk, which is a regular post town. On the 1st of October the master of the Friends delivered his letters into the post-office at Norfolk, and with them, as it would seem, the letter of Finkin, ordering insurance. This appeared from its being proved that the post from Norfolk arrived at Baltimore in seven days, and from one of the letters for insuring being received on the 7th of October, marked, "Nor-

folk, Shp. 19." While at Norfolk, Finkin wrote a [*225] letter to Boston, *dated the 1st of October; on the 6th he joined with Rhodes in a protest, and after remaining there seven or eight days, without writing to his correspondent in Baltimore, he at length hired a pilot-boat to take him there, but, from adverse winds, could, after beating five days, reach no further than Fell's Point, from whence he immediately despatched to Mr. Stouffer a letter, informing him of the loss of the Harriet and Ann, which arrived at Baltimore on the 14th, and was the first information of the disaster, given to, or received by, Mr. Stouffer, who had, on the 8th, written to the plaintiffs for the present insurance, which was effected on the twelfth.

Upon this testimony the judge charged the jury that in point of law, it was not incumbent on Mr. Finkin to have written from Norfolk, countermanding his order for insurance.

The jury having found for the plaintiff, the application now made was to set aside the verdict for misdirection, and because Stouffer knew of the loss when he gave directions to insure

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Hoffman, previous to entering into the argument, offered some affidavits and papers, agreed to be read in some other suits on the same policy, should a new trial be ordered in this, and insisted on their admissibility, though making no part of the case, because they tended to supply defects in the testimony upon points in which the defendant rested on the insufficiency alone. He argued that these ought to be received, because the application was to the discretion of the court, and if they were satisfied, from the documents adduced, that the facts disputed must be established, it would be useless to award a new investigation to establish them. The practice of the court, he said, was in conformity to his request. In *Duncan v. Dubois*, January term, 1802, it became necessary on the trial to show a private act of congress. The common statute book was read, and a verdict found. Application was made to set it aside for admitting improper evidence. Between the trial, and the time of making the motion, an exemplification had been received, and on being produced a new trial was refused, because the defect in testimony was supplied. In addition to this authority the English books furnished similar determinations. In *Lyster v. Mundell*, 1 Bos. & Pull. 427, an affidavit was received, falsifying the testimony on which a verdict was obtained, though the court observed it was unusual so to do. In *Hibbert v. Carter*, 1 D. & E. 747, after argument, and a new trial refused, an affidavit was *received, and the former [*226] determination reversed. Therefore the court would certainly receive these papers to support a verdict, in which justice had been done. As it is done to show testimony, so it ought to establish what is questioned.

Harrison, contra. This attempt is not only novel, but too dangerous to be tolerated. It is one thing to show newly discovered evidence, and another to take away our right of rebutting.

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KENT, Ch. J. stopping *Harrison*. There is a great difference between offering evidence or affidavits to open an inquiry, and offering them to shut out investigation. The cases cited, from the decisions of Westminster Hall, were of the former description; the present application is to close the door against the admission of new light. As to the determination in *Duncan v. Dubois*, the document there adduced plainly established that no further elucidation could be shown. It could not have been controverted by other testimony. But we are now called upon to prevent controverting that which is controvertible. The papers cannot be received.

SPENCER, J. There would be extreme danger in permitting a party to thus read affidavits, which the opposite side has had no opportunity to rebut, and thus decide the cause *ex parte*, when, on a trial, every thing contained in the depositions might be disproved. Were we to grant the application, it would be a precedent for our hearing, on all subsequent occasions, what ought to be offered only to a jury.

TOMPKINS, J. Suppose witnesses should be now ready to disprove every thing contained in the papers offered, are they to be shut out? The application must be refused.

Pendleton, for the defendant. When Finkin, on the first of October, wrote to Boston, he had the same opportunity of writing to Baltimore, and his silence arose only from a fear that the insurance was not effected. He might not, perhaps, have been able to recall his letter ordering insurance; but as he was on the spot from whence it was sent at the very time when put into the post-office, and then was apprised of the loss, it was his duty to have forwarded a countermand. Wherever a party has, in good faith, directed insurance, if, before it be carried into execution, he know a loss has taken place, he is bound to revoke his commands, when by ordinary means it can be done. Nay, if he possibly may know it, he is equally under an obliga-

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tion so to do, and it is this principle which has occasioned the regulations of the 38th (*Quære*, 30,) article of the ordinances *of Louis XIV. that persons living [*227] within any distance of a port, at which an account of loss arrives, shall be presumed to have obtained knowledge of that fact, within such a time as the news would have reached them, at the rate of a league and a half per hour, and if the policy be effected within that period, it is void, on account of the presumed fraud. Suppose Finkin had arrived safely, and, on his arrival, knew the letter with orders for insurance was, at the time when writing to Boston, going off in the same post, would he not have written to countermand his insurance, and save his premium? Doubtless he would. The same activity is required to be exerted in favor of the insurer, and therefore when a direction for insurance can, after a knowledge of loss, be countermanded, previous to its being carried into execution, it must be done, or it amounts, in law, to a fraud. 2 Emer. 137, citing Le Guidon, c. 4, and the ordinances of Louis XIV. The same doctrine is found in the Scotch and English authorities. *Grieve v. Young*, Millar, 65. *Fitzherbert v. Mather*, 1 D. & E. 12. Finkin knew his letter for insurance was on board the ship in which he arrived. He knew this letter must necessarily, and according to the act of congress, be put by the captain into the post-office at Norfolk; he ought, then, to have accompanied it with one giving an account of the loss.

Riggs and Hoffman, contra. The evidence, as stated in the case, does not establish that Finkin wrote to Boston by the mail. He might have sent his letter by a vessel. But it is a mistake to say he was bound to write. There is no settled principle requiring it of an assured, under circumstances like these. The authorities cited from Millar, and D. & E. only show that if a single letter ordering insurance be sent off after knowledge of a loss, it is in law, if there be no other order, fraudulently transmitted. But here three

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letters were written and sent off by three different conveyances, long antecedent to the disaster. Finkin's arrival at a port where only one letter was, did not give him a power over the others. They were beyond his control. We contend that the act by which insurance was directed, having been executed, and the letters fairly sent on their rout, the assured had a right to be passive, and take his chance. He had not, as in the cases cited, the power to stop all the orders. The reasonings of the French authors, as to fraud in policies, are not applicable to our code. By their ordinances, certain acts are required to be done; when they are omitted, their law raises the presumption of fraud.

[*228] *With us fraud is never to be presumed; it must be found by a jury. With them it is matter of law; with us matter of fact; and the very verdict, therefore, is proof against its existence. Besides, these very ordinances have been found so impolitic, that it has been necessary to frame a particular clause to obviate their baneful effects. The French policies, therefore, run "good or bad news not to affect." As there is not, by our law, any fraud to be presumed from the circumstances of the case, it was matter for jury consideration, and they have determined.

Harrison, in reply. Great as the power of the jury is in itself, and properly and constitutionally great as it ought to be, yet I know that this court exercises a control over them, whenever they have, from the facts before them, drawn wrong conclusions. Those facts upon principles of good faith, which peculiarly govern in cases of insurance, made it a legal duty to give information of the disaster instantly on arriving, as the order for insurance, then known to be going from the very spot where Finkin was, would otherwise induce a belief the vessel was in safety. In the case cited from *Millar*, the loss was not known till an hour after the time at which the mail usually departed; yet, because no endeavor was made to countermand, and it

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was proved that it might have been effectually made, the policy was held to be void. Had Mr. Finkin written on the first day of the month, the letter would, by the course of the post, have been received in Baltimore on the 7th, and thus have prevented the order being sent off on the 8th. It is no answer to say, Finkin might not have been acquainted with the regulation at the post-office, or even that Norfolk was a post town. As it was his duty to write, it was his duty also to inquire. But the presumption of law is, he was acquainted with the course of business relating to a transaction he was bound to perform. When doubtful whether the insurance was effected or not, it was a point of good faith to communicate the loss.

LIVINGSTON, J. delivered the opinion of the court. It is contended on the part of the defendant, either that Stouffer, when he gave the order for insurance, knew of the loss of the Harriet and Ann, (in which case the policy would certainly be void) or that Finkin might, and ought to, have communicated to his partner information of the accident, immediately after his arrival at Norfolk, because this would have prevented the insurance, and that his neglecting so to do was a constructive, or *a positive [*229] fraud, either of which will equally vacate the insurance.

As to the first allegation, that Stouffer knew of the loss when he wrote his letter of the 8th October, 1801, we are all satisfied that it is unsupported by any testimony whatever. There can be no doubt that he had no intelligence of the misfortune until the 14th of that month, and that he acted with perfect good faith in ordering the insurance. There is no room, therefore, to impute to him fraud or impropriety. Were the cause relieved from every embarrassment but what arises from his agency, we should, without difficulty or hesitation, say that justice has been done, and refuse a new trial. The conduct of his partner, however, is not so free from exception. If it has not been such as

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the defendant had a right to expect, or the rules of law imposed, not only he, but all those concerned with him, and who are of course answerable for his acts or negligence, must suffer. The case, as it respects the behaviour of Finikin, is not without difficulty. If his letters of the 16th August, directing insurance, were written in good faith, and sent in season, he might suppose that as he had fairly run the risk of paying a premium, it was not incumbent on him, even after a loss, to take any step to his own prejudice. In this view of the subject, perhaps no actual fraud is to be imputed to him; nor do we mean to say that in all cases whatever, it is the duty of a party who has directed an insurance to send immediate notice to his agent of every disaster which happens with a view of defeating orders given in sincerity, merely because it is possible the countermand may arrive in season. That question is not now before us, and when it occurs will require very serious deliberation. We are now called on to say whether, if a person, having sent orders to insure from a foreign country, shall afterwards arrive in the neighbourhood of the port to which his letters are transmitted, and on board of a vessel in which he knew one of them to be, under apprehensions also of insurance not being effected, he be not bound to give his agent information of a loss by the same mail which he must have known would carry his letter?

The counsel for the defendant have referred us to the 38th article of the celebrated "*ordonnance de la marine*" of Louis XIV. to Pothier on Insurance, c. 1, s. 24, to Valin, vol. 2, 94, to 2 Emerigon, 137, and to Le Guidon, c. 4.

This article of the ordinance which has been [*230] cited "annuls*all insurances made after the loss, or or arrival of the property assured, if the assured knew or might have known of the former, or the assurer of the latter, before the signature of the policy," The ordinance then defines what shall amount to presumptive evidence of such knowledge; but, without investigating the propriety of this regulation, it is sufficient to say that

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this rule, in the extent here prescribed, has not been adopted either in England or in this country. It is not sufficient that the assured might have known of the loss. It must be proved that he did know it: and in many cases he may even know of the loss at the time of subscribing the policy, and yet the insurance be valid; as in the present case, if the policy had been subscribed on the 30th of September, 1801, it would have been effectual, although Finkin then knew of the loss. But little light, therefore, will be reflected on the present question, either from this ordinance or the commentaries on it. Emerigon, it is true, in treating of insurances made by agents, (vol. 2, p. 148,) declares a policy void, "if the principal, being informed in time of an accident, do not revoke his order." In conformity with this principle we find a decision in the court of session, in Scotland, reported by Millar, p. 65. It is the case of *Greive against Young*. On the 10th of December, 1799, Greive wrote to his correspondent in Edinburgh to insure his vessel. This letter was sent on the evening of the 10th to the Press, five miles off, on the London road, where it would be taken up by the post early the next morning. The letter arrived at Edinburgh about six o'clock in the afternoon of the 11th, and insurance was effected. At ten o'clock on the morning of the 11th, the ship sunk in the sight of Greive. The post left the Press usually before seven in the morning, but oftentimes as late as nine, ten or eleven, and sometimes, though seldom, not before one or two in the afternoon. On the 11th of December the post did not leave it till near ten. It was determined that Greive ought, by express, to have informed his correspondent at Edinburgh of the disaster, to prevent insurance, as he had reason to think an express would have reached Edinburgh in time for that purpose. The cause being removed into the court of session, they thought it was not incumbent on Greive to send an express, but being satisfied that he had time to countermand the insurance in

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the ordinary course of the post, and that it was his duty to have done so, judgment was given for the underwriters.

In the case of *Fitzherbert v. Mather*, in the king's [*281] bench *of England, an insurance was held not recoverable because the agent of the assured, who had written him a letter, on the 16th September, 1782, informing him of the sailing of a vessel in which he had shipped certain property on his account, on which letter insurance was effected, neglected to send him information of her loss, which came to his knowledge the next morning. "The agent," says Lord Mansfield, in delivering his opinion in this cause, "acted honestly when he wrote the letter; but on the 16th, at night, he heard the ship was on shore, and the next morning he knew that she was lost. The post did not go out till the afternoon of that day, therefore he had full opportunity to send an account of the loss." This last decision, it must be confessed, bore extremely hard on the assured, because Thomas, being his agent only for the purpose of making the shipment, it might well be supposed, by himself and others, that his agency ceased as soon as the goods were on board, and he had sent on the invoice and bill of lading. It proceeds, however, as well as the case from *Millar*, on the principle relied on by the defendant, that orders for insurance must be revoked, after a loss, where there is a probability the revocation will arrive in time. Nor will this appear unreasonable, when we recollect how much an underwriter is in the merchant's power. He may lose the chance of insuring, not only by hearing himself of the safe arrival of the property, but, is exposed to every possible diligence and activity, which interest will inspire, and which, of course, will be exerted by the other party to prevent an insurance in such an event. Not only the mail, but expresses, will be resorted to, to convey the important intelligence. If, then, a person be permitted, in this way, to prevent an insurance, or an order given, in good faith, and thus deprive the assurer of a premium, there is no hardship in imposing on him a rea-

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sonable diligence, in communicating a disaster, so long as such information may very probably be expected to arrive in time. He should not be allowed to be active to save a premium, and passive in obtaining an indemnity against a loss, which has happened early enough to be communicated, by ordinary diligence, to the underwriter. If, in the present case the Harriet and Ann had arrived safe at Norfolk on the same day with the friends, no one can doubt that Mr. Finkin would have tried to stop his letter *in transitu*, or would immediately have despatched an express to Baltimore or at least have written by *the first [*282] mail; in which case, insurance would not have been made. This arriving in a vessel on board of which was one of his letters directing insurance, and, under apprehensions that none was effected, are circumstances which have very great influence on our decision. He had reason to believe, when he arrived at Norfolk, that no insurance was made, and must therefore have known that it was in his power to prevent it. It cannot be believed he was unable to get a letter into the post-office, at that place, and still less, that he was ignorant that his letter to Mr. Stouffer, which was on board the Friends, would be lodged there by the captain. There is something said of his being sick part of the time, but it will be remembered, that on the 1st of October, he wrote to Mr. Merry, and on the 16th, he was on shore. It was as easy to write to Mr. Stouffer as to Mr. Merry, and if too unwell to go on shore, he might easily have sent it to the post-office. It is not very clear that he might not have obtained from the captain of the Friends possession of his own letter to his partner, if he had asked for it. Perhaps, however, this could not be done, as masters, who arrive in the United States, are, by law, to deliver to the postmaster all letters which are brought in their vessels. Be this as it may, Finkin must either be presumed conusant of the law on this subject, in which case he would know that his letter would be put in the post-office, or he must have in-

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quired of the captain what would be done with it, who would have given him this information. His permitting this letter, then, to go forward, under circumstances of this nature, without taking any one step to counteract its effect, must be deemed, if not a misrepresentation, at least so gross a neglect as to vacate the contract altogether. His silence and inactivity could hardly have been accidental. A designing man would reason, as it is too probable he did, "My other letters may not yet have reached Baltimore; my only hope, therefore, is on the one which will be forwarded by the Captain of the Friends; I will, then, let this go on and say nothing of the accident until it has been acted on." Such reasoning cannot be endured. It will not help the plaintiff, to say that the other letters, or one of them, might have come to hand. To this an answer has already been given. Mr. Finkin himself thought otherwise, and, at any rate, it was no excuse for letting a letter go on uncontradicted, after the loss was known. If

the other letters had miscarried, the insurance [*233] *would have been effected on the one thus improperly forwarded. Another answer is, that as this letter did go on, he should at least have given the underwriters, who were so much in his power, a chance of receiving timely information of the loss. Had this been done and insurance effected on either of the other letters, all would have been safe. The principle of the decisions, which have been cited, and which we here adopt, will prevent frauds, will place the assurer on a more equal footing with the merchant, will produce good faith in transactions of this nature, and not leave it in the power of a crafty or designing man, to make his own advantage, to the prejudice of a third person, of every circumstance which may happen, be it disastrous or otherwise. Upon the whole, therefore, after mature deliberation, we think the judge who tried this cause was mistaken in his charge, and that it was, under all the circumstances of this case, incumbent on Finkin to have written to his partner, apprizing him of

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the loss of the Harriet and Ann, and that, not having done so, a new trial must be granted, with costs to abide the event of the suit.(a)

New trial.

HALLOCK against ROBINSON.

A plaintiff declare in trespass generally, and the defendant plead *liberum tenementum*, setting out the close with metes and bounds, the plaintiff should new assign. If he do not, and conclude with an averment, it is fatal on special demurrer. Amendment allowed, on payment of costs, after demurrer argued, and the judgment of the court pronounced, though an amendment had once before been granted.

ON demurrer *quare clausum fregit*.

The plaintiff declared generally, for breaking and entering his close in the township of Brookhaven. The defendant pleaded *liberum tenementum*, specifying and setting it out by metes and bounds. To this the plaintiff, without new assigning, replied his own freehold, traversing the freehold of the defendant, and concluding with an *et hoc paratus*, praying his damages. The defendant demurred specially, and showed for cause a variety of reasons, but relied principally on the want of a new assignment, and the not concluding to the country.

Sanford, for the demurrant. The replication, we contend, is defective. The law in actions of trespass is this: The plaintiff may declare generally for a trespass in a certain town, or he may particularize the close, give it a name, and set it out with metes and bounds. In the latter case the defendant is bound to answer to a trespass in that close. In the former the defendant may plead *liberum tenementum*,

(a) See this case, 1 Johns. Rep. 150, and the special verdict on the new trial granted in the text, upon which the court ordered judgment for the defendant.

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and particularize the *locus in quo*. If this be done, [*234] the plaintiff has but two *modes in which to reply.

He must either new assign, or admit the trespass committed in the place specified in the plea, and take issue on its being the freehold of the defendant. If so, the question then is, is this such a replication? In all other cases, where there is not due certainty in the first instance, it is ground for a demurrer. In trespass, to compel to this certainty, pleaders have framed the common bar, which drives the plaintiff, by a new assignment, to that precision which he ought, in his declaration, to have adopted, and takes from him the advantage, he would otherwise acquire by this general mode of declaring, of giving in evidence a trespass in any close in the town. If it was meant to rely on the trespass committed in the close specified in the defendant's plea, the plaintiff should have taken issue on its being the freehold of the defendant, and have concluded to the country. Either of these causes of demurrer are fatal to the replication.

Woods, contra. The principles of pleading, in this form of action, are not controverted. As to the replication in question, in *Lilly*, 440, there is a precedent exactly similar. The issue was open to the defendant, who might have taken it on the traverse. Esp. N. P. 410; Bull. N. P. 93; Stra. 871.(a)

Sanford, in reply. The entry in *Lilly* contains nothing incompatible with what has been stated. The plaintiff there set out his close with certainty by name. Therefore the object of the defendant here was answered. Where the plaintiff takes issue on the place, as alleged in the plea, he must conclude to the country. The replication is as

(a) *Baynham v. Mathews*. The rule is, wherever the whole substance of the plea is put in issue by the replication, you may conclude to the country, notwithstanding the traverse. When this is not the case, there must be an averment. See *Manhattan Company v. Miller*, ante, 61, n. (a)

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general as the declaration, and no answer to the plea of freehold, in the close set forth by the defendant. In 6 Bac. Abr. by Gwillim, 620, citing Lutw. 1399, it is laid down as settled, that when, to a plea of *liberum tenementum*, the plaintiff does not new assign, he must take issue on the plea, and conclude to the country.

KENT, Ch. J. The replication is evidently no answer to the plea of the defendant, setting forth, by specific metes and bounds, a particular close as his freehold. The plaintiff replies only that the close in the declaration is his close, but says nothing as to the specific close in the plea, which is left totally unanswered. If the plaintiff had averred the close in the plea to be his, he ought perhaps to have tendered an issue. As, however, we think the plaintiff should have new assigned, *it is unnecessary [*235] to decide in what manner his replication should have concluded.

Woods applied for leave to amend on costs.

Sanford resisted, as there had been one amendment without costs, and hoped, if it were granted, it would be on payment of those formerly incurred.

KENT, Ch. J. Amend on payment of the costs of this demurrer.

Judgment for the demurrant, with leave to amend.

 VAN COTT *against* NEGUS.

In trespass in the common pleas, for running foul of the plaintiff's vessel, if he recover only six cents damages and six cents costs, he must pay costs to the defendant.

TRESPASS on the case, brought in the common pleas, against the defendant, for so negligently and unskillfully

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managing his vessel, that she ran foul of and injured the vessel of the plaintiff, and disabled some of his sailors. The jury found a verdict for the plaintiff, with six cents damages, and six cents costs. It was submitted to the court, to determine whether the plaintiff should recover his costs, or pay costs to the defendant.

Per Curiam. We think the defendant entitled to receive costs from the plaintiff.

Costs to the defendant.

SCHUYLER against VAN DER VEER.

If an award state that which is to be done by the plaintiff so uncertainly that the defendant cannot compel performance, it is fatal on demurrer, though the plaintiff in his replication show a breach in a part that is certain and good.

THIS was an action on an arbitration bond, the declaration in the common form.

The defendant demanded oyer of the condition, which was set out in the following words: "The condition of this obligation is such, that if the above bounden, John Van Der Veer, his, &c., do well and truly pay to the above named John Schuyler, his, &c., the full sum of one hundred pounds, of good, &c. on the 10th day of December next, if the said John Van Der Veer does not abide by the award of , arbitrators indifferently chosen to settle all matters of controversy, then this obligation to be void," &c.

To this the defendant pleaded no award.

The plaintiff replied showing an award, that all controversies touching the premises, in the submission mentioned, should cease; that the said John Schuyler and John Van Der Veer should finish the house between them, and be so far complete as to board it over the roof, and the

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floor all complete, and a chimney, and if the *said [*236] John Van Der Veer should keep the stove, then he should pay John Schuyler fifty shillings for it; that Van Der Veer should pay Schuyler eleven pounds ten shillings; that the costs of the arbitration should be jointly borne, and the parties pass receipts to each other from the beginning of the world. The replication then stated a breach in not paying the eleven pounds ten shillings. To this the defendant demurred, and showed for causes that the plaintiff had not alleged performance of what he by the award ought to have done; that the award was uncertain and inconclusive, in not specifying what house Schuyler and Van Der Veer were to finish, nor the materials with which, nor the person for whose benefit it was to be finished; and also in not making it appear for keeping what stove Van Der Veer was to pay, and in not ascertaining the proportion of costs each one was to pay, and to whom. Lastly, that personal services were awarded. On this demurrer, in which the plaintiff joined, the cause now came before the court.

Hildreth, for the plaintiff. The ancient authorities obliged the plaintiff to show, after having set forth the award, performance on his part of those acts which, by the award, he was ordered to do, except when those things to be done by the defendant formed a condition precedent. Modern adjudications have narrowed these decisions, and reduced their applicability to two cases; 1st. Where the acts to be done by the plaintiff are so doubtfully set down, that their performance cannot be compelled, and the whole award would be void for want of mutuality; 2d. Where, by the terms of the award, the acts which he is to perform make a condition precedent. Here nothing appears to be awarded the defendant which he can claim to his use, therefore no acts to be done by the the plaintiff which can form a condition precedent. If it is urged that there is then a want of mutuality, it is sufficient to say releases are awarded, and

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that has always been held to be a mutual benefit. *Harrie v. Knipe*, 1 Lev. 58. But allowing many of the objections to hold, the award is good in that part which orders the payment of eleven pounds ten shillings. It is there the breach is laid, and whatever may be the fate of the other parts, this, showing a good cause of action, is conclusive for the plaintiff. In *Fox v. Smith*, 2 Wils. 268, the pleadings were similar to the present case, and it was ruled, that as the breach was well assigned in that part of the award which directed the payment of sixteen pounds ten [*237] shillings, *and that breach stood confessed by the defendant's demurrer, the plaintiff was entitled to judgment. The reason is obvious; any one breach is a forfeiture, and a recovery for that, is a bar to any future action on the same bond. So in *Addison v. Gray*, 2 Wils. 293, among a variety of acts to be done, general releases and payment of a specific sum were ordered; the breach was laid in not paying the money, and it was, without hesitation, determined the action was well brought.

Cady, contra. The condition of the bond is in the alternative, either to pay one hundred pounds, or abide by the award. The non-performance, therefore, of the award, is not a forfeiture of the bond, for the defendant might have paid the one hundred pounds to exempt himself from its performance. The plaintiff, therefore, by the mere allegation of a breach, does not show any cause of action. 4 Bac. Abr. (old ed.) 135. The court cannot presume the one hundred pounds were not paid. The uncertainty of the award is manifest; and it may be doubted how far any averment could have reduced to a sufficient certainty the vague expressions of "the house" and "the stove." If intended for the benefit of the defendant, as perhaps the payment ordered, of the eleven pounds ten shillings, may suggest, yet if it be so uncertainly set forth that he could not compel performance, and performance is not averred, the award is bad *in toto*. Kyd, 169, 170, 173, 174.

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Emott, in reply. The one hundred pounds mentioned in the condition of the bond are nothing more than a super-added penalty. It was unnecessary, therefore, to allege the non-payment. Had it been paid, it ought to have been shown by the defendant, as it would have constituted a defence to the action. As *nul agard* is pleaded, it may be a question whether the payment of the one hundred pounds could be urged. By such a plea, the defendant admits that if there be an award, and a breach shown, he is liable to the penalty of the bond. To render an award void for uncertainty, it must be such an uncertainty as is so to the parties. "The house" and "the stove" were known to them, and might have been identified by averments. In *Styles v. Triste*, (1 Sid. 54,) an award that one should keep and enjoy "the goods," paying so much money, was held to be a valid award. So, where a certain sum was directed to be paid towards reparation of the house, without saying what house. *Hopper v. Hacker*, 1 Keb. 788. It must be intended *the house* and *the stove* in the pleadings were *those in dispute; and if the award [*288] be final, then it is mutual within the meaning of the law.

LIVINGSTON, J. The defendant has assigned the following causes of demurrer:

1. That the plaintiff has not alleged his doing those things which, by the award, were to be done and performed by him.

2. Because it does not appear by what authority the award was made.

3. Because the award is uncertain, and inconclusive in its not appearing therefrom "*what house*" the parties were to finish between them, or with what materials, or for whose benefit it was to be finished; or for "*what stove*" the plaintiff was to receive fifty shillings, or what costs the parties were to pay, or what proportion each was to pay, or to whom they were to be paid.

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4. Because that part of the award which relates to finishing the house, is an award of personal service.

I shall consider only the third objection, for that being, in my opinion, fatal, renders it unnecessary to examine either of the others.

The intention of all parties to an arbitration, is to have their controversies finally settled, and something ascertained which was before doubtful. Hence, it is a rule that awards shall be so plainly expressed, as that there may remain no uncertainty as to the manner in which they are to be executed. Each party should not only know what he is to do, but should also be able to compel the other to perform what he is ordered to do. This cannot be the case unless the arbitrators make use of language which is intelligible as well to the parties themselves as to those who may be called on to enforce their decisions. Although courts have departed from the strictness with which awards were formerly examined, and which was a reflection on the administration of justice, yet they have not carried their indulgence so far as to dispense with their being certain, at least to a common intent. Without adhering to this rule, an award might be so obscure as that neither party would know what he had to do; in such a case, if it were, nevertheless, binding and final, great injustice would be done; for there could be no recourse on the bond for not performing the award, and yet the remedy on the original ground of controversy would be gone. To take the present case out of this rule, it is said, that if the award be good in that part whereof the breach is assigned, it is sufficient, [*239] and the plaintiff must *have judgment, according to the decision in *Fox v. Smith* and *Addison v. Gray*, 2 Wils. 267, 293. But there is a manifest difference between those cases and the one before us. By those awards, except as to an exchange of releases, there was nothing to be done but by one of the parties. The defendant, in each of those suits, was to pay the plaintiff a sum certain, and

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also some costs, without mentioning how much. The court held, that as the awards were certain as to the specific sums directed to be paid, it was no reason why the plaintiff should not have the benefit of them so far, especially as they thereby waived their right ever to recover the costs, which was an advantage to the defendants. This rule, however, cannot apply where distinct things are to be done by the different parties; for, in such cases, what is to be done by the respective parties must be set forth with equal certainty; otherwise the one may enforce that part of the award which is in his behalf, while the other can have no relief for such parts as are intended to be in his favor, because of the ambiguity of the language made use of. Such is the nature of this award. The sum to be paid to the plaintiff, and for non-payment of which this action is brought, is sufficiently certain; but it is unreasonable he should receive this money, unless he performs, or can be compelled to perform, those things which he is directed to do, and which must have formed part of the consideration for giving him this sum. In other words, if the defendant can have no remedy against the plaintiff for what he is to perform, on account of the uncertainty in the meaning of the arbitrators, the whole award, however explicit as to what he is to do, must be nugatory. It remains to be examined whether that be the case here. The parties are enjoined to finish "the house" between them. Here is something to be done by the plaintiff, (and most probably for the defendant's benefit,) for the omission of which he ought to be liable, and yet it is very problematical whether he might not shelter himself under the uncertainty of the direction. What house was to be finished? Where did it stand? What were its dimensions? What materials were to be used? When was it to be completed? Or for whom? Nor can the uncertainty of the award in this respect be helped or removed, either by reference to the submission, or by the context of the award, or by anything

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connected with it. Nor does it fall within those cases where averments of the party may render certain that which is not sufficiently defined by the arbitrators themselves.

[*240] An averment is sometimes *admitted to support an award, which has an appearance of being uncertain, but when there is no means of ascertaining what is thus doubtful, but by travelling out of the instrument altogether, and relying entirely upon parol testimony to show the intention of the arbitrators, the experiment is dangerous and ought not to be made.

The same uncertainty prevails as to "*the stove*" which the defendant was to keep at the price of fifty shillings. As *the house*, it is called *Kai' exochen*, "*the stove*." There might be several stoves in his possession. What entitled it, therefore, to this honorable distinction, or whether it would in that way be known, even to the parties themselves, does not appear. But, as has been already said, it is not sufficient that the parties understand the arbitrators; their language should be intelligible also to those to whom application may be made to give effect to their decisions.

Equally uncertain is the award as to the costs to be paid. To pay the charges accrued in a particular suit, without mentioning the sum, is good, because they may be taxed by the proper officers; but here no suit is mentioned, nor does any appear to have been pending; and if they were, the costs or expenses of the arbitration, (which does not appear to have been made a rule of any court,) I do not perceive how they were to be ascertained.

Upon the whole, there is so much uncertainty in everything which the plaintiff is ordered to do by this award, that I think it but common justice to the defendant to consider the whole as void. My opinion, of course, is that he have judgment.

KENT, Ch. J. I am of opinion the whole award is void for uncertainty.(a) It ought to appear from the context

(a) An award directing "good and sufficient security for the payment of

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of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, what things the parties are ordered to do. Kyd, 129, 134. Here is nothing to which this award can be referred for explanation; and it does not appear from the award itself what house, or stove, or costs are alluded to. It speaks only of *the house*, *the stove*, and *the costs*, without adding one word by way of reference or explanation. An award may be good in part and bad in part, provided the latter be independent of, and unconnected with, the former. Willes, 66. But that does not seem to be the case here. The payment of eleven pounds ten shillings is connected with the costs, and the passing of receipts *must [*241] have reference to some controversy about the house. It is, upon the whole, too vague, or rather senseless a paper to be the basis of an action. Nor is there equal justice by sustaining the suit; for the mutual obligation about finishing the house, must be intended for the benefit of the defendant as well as of the plaintiff; and if, owing to the absolute uncertainty of that part of the award, he can have no remedy to coerce the plaintiff to perform any part beneficial to the defendant, he ought not to be bound to pay the eleven pounds ten shillings to the plaintiff. We are to presume the payment was to be in consideration of the efficacy of the preceding part which was favorable to the defendant.

I am therefore of opinion that judgment be for the defendant.

TOMPKINS, J. I concur in the opinions delivered.

SPENCER, J. Several objections have been taken to the award and replication.

money," in two instalments, is void for uncertainty in not stating the nature of the security, whether it was to consist of real or personal security, or to what extent. *Jackson v. De Long*, 9 Johns. Rep. 43.

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1. That the condition of the bond is in the alternative, if the defendant pays 100*l* if he does not abide by the award, then the bond to be void, and that the plaintiff should have averred the non-payment of the 100*l*.

This bond is inartificially drawn. The 100*l* mentioned in the condition, can be regarded in no other light than a superadded penalty, not recoverable in the non-payment of the eleven pounds ten shillings. When, therefore, the plaintiff alleges the non-payment of the eleven pounds ten shillings, he alleges a substantial breach in the award. I reject the mention of the 100*l* as wholly superfluous. It is not an alternative imposed by the arbitrators.

2. That the plaintiff has not averred the performance of those parts of the award to be performed by him, and for the benefit of the defendant.

The payment of the eleven pounds ten shillings does not depend on any condition precedent; it is an independent and substantive part of the award. It is said that the finishing of the house was for the benefit of the defendant; but this does not appear from the award; nor does it appear on what account the eleven pounds ten shillings were to be paid.

3. That all matters are not decided on by the arbitrators.

This is not requisite. An award may be good in part and void in part. This award requires that receipts should be passed between the parties from the beginning of the world to the day of the award; it also awards that [*242] all controversies *shall cease. There are some parts of the award faulty, particularly as to the costs. But courts of law have regarded awards with so favorable an eye, as not to suffer the good parts of them to be injured by the bad. In my opinion judgment ought to be rendered for the plaintiff.

THOMPSON, J. The objections taken by the defendant's counsel to the plaintiff's right of recovery in this case,

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may be considered, first, as against the replication; and secondly, as against the award of the arbitrators. The exceptions to the replication are, that the plaintiff should have averred performance on his part, and also should have alleged that the defendant had not paid the 100*l*. mentioned in the condition of the bond, nor performed the award, considering the condition of the bond in the alternative. The cases which require an averment of performance on the part of the plaintiff are, where what is awarded to be done by him is void, and where his performance is a condition precedent. *Kyd.* 197. Where the award is void on his part, he should suggest performance to remove all objections on the part of the defendant on the ground of want of mutuality. Where performance on the part of the plaintiff is a condition precedent, it falls within the general rule, that where a plaintiff's right or interest commences upon condition or act to be done by him, he must aver and show performance on his part to entitle him to recover. 5 *Bac. Abr.* 337. Neither of these rules, however, can be applied to this case. For performance on the part of the plaintiff is not a condition precedent, nor is the award wholly void as to the acts to be done by him. This exception must therefore fail: nor do I think the other objection to the replication well taken. The condition of the bond is inartificially worded. But the obvious intention of it was to abide the award, and not for the payment of the 100*l*. in any event. Admitting it, however, to be in the alternative, either to pay the 100*l*. or perform the award; it was so at the election of the defendant. If he had made his election and had paid the 100*l*. he ought to have pleaded it, which would have been a good answer to the present action. *Kyd.* 204. The rule that where an award is in the alternative, the plaintiff in assigning the breach must allege that the defendant has neither done the one nor the other, cannot apply. The award is not of that description. The alternative, if any, is in the condition of the bond.

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The exceptions taken to the award are, that it is not mutual; that it is not pursuant to the submission; [*248] does not embrace *all matters in controversy, and is uncertain. The award that the parties shall pass receipts to each other from the beginning of the world to the date of the award, is equivalent to an award of a final settlement; and that the parties should execute to each other general releases, which has been uniformly held sufficient to render an award mutual. Kyd, 148, 149. I do not see in what respect the award is not pursuant to the submission. The submission is a general one of *all matters of controversy*. 2 D. & E. 647. These words are sufficiently broad to embrace every subject of dispute between the parties, and the award purports to be a final settlement of all differences. Although the submission contains no power of awarding respecting costs, yet that is held to be a power necessarily incident to the authority of the arbitrators. Kyd, 100. The uncertainty in the award, however, as to the costs, and as to the house to be finished by the parties, and the stove, which the defendant had a right to elect to keep, cannot affect the plaintiff's right of recovery. No breach is alleged in these respects; nor does it appear for whose benefit those things were to be done. Besides, I am not satisfied that all these uncertainties might not be supplied by proper averments. But admitting the award to be bad in these particulars, an award may be good in part although bad in part. The only breach assigned is the non-payment of the eleven pounds ten shillings, which is a distinct and independent matter. In this the award is sufficiently certain and good. I think the case of *Fox v. Smith* very analogous to this. 2 Wils. 267. The chief justice there says, if the award be good in the part whereof the breach is assigned, (the defendant having admitted the breach by his demurrer,) the plaintiff must have judgment, and in this the whole court concurred.

I am therefore of opinion that none of the exceptions

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are well taken, and that the plaintiff should have judgment.

Judgment for the defendant.

DEVOE *against* ELLIOT.

A sheriff cannot levy on goods by virtue of a *fi. fa.* after the return day is past.

THIS was an action against the defendant to recover the value of a mare, sold by him to the plaintiff.

The facts were, that on the 17th of June, 1800, a writ of *feri facias* was delivered to the sheriff of Montgomery, against the goods, &c. of Avery Herrick, returnable on the third Tuesday, in July then next. On the tenth of November *following, Herrick bought the mare [*244] in question, and sold her to the defendant, of whom she was purchased by the plaintiff. A few days after this, the sheriff levied on the mare in the plaintiff's hands, and sold her by virtue of the writ, then remaining unsatisfied.

The only question for the court was, whether a sheriff by virtue of a *feri facias*, put into his hands before the return day, can legally sell goods which the party, against whose property the writ issues, may acquire, subsequent to the return?

Obdy, for the plaintiff. There is no case exactly in point; we contend, however, that till the debt is satisfied the writ will affect property coming to the hands of the person against whom sued out; otherwise the officer who begins an execution will not always be enabled to finish it. Yet this is what he is directed to do. 2 Bac. Abr. tit. Execu. 366. In the case of a *levari facias*, against the lands of ecclesiastics, we find the writ is operative after the

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return. 2 H. Black. 582.(a) In principle there is no difference between the two executions by *feri facias*, and that by a *levari*. Was it otherwise than as we insist, a subsequent execution might be satisfied, while the first lay in the sheriff's hands totally unproductive.

Hildreth, contra. After the return day, the writ is dead in law. Its legal force is totally exhausted, and it warrants no kind of proceeding. 1 Salk. 321. 1 Vent. 30. Yelv. 157. Hob. 72. Tidd's Practice, 385, tit. Execution.

Per Curiam. The only question arising in this case is, whether a sheriff can, by virtue of a *feri facias*, duly delivered to him before the return day, legally levy on, and sell, goods and chattels acquired by the defendant after the return day in the execution? We think he cannot.(b) We take it to be a general principle that all process must be served before the return day. The utmost length the law allows for executing a writ is the day whereon it is returnable. When a sheriff has levied an execution in due time, he may complete the same by sale after the return day, but should he omit levying until that day was passed, the execution is dead. If these positions be correct, we cannot see how goods purchased by a defendant, after the return day in an execution is passed, can be taken and sold under such process. The only mode, we conceive, of getting at

(a) *Marsh v. Flaccett*. The reason the execution *de bonis ecclesiasticis* allows of levying rents and profits after the return day is, that it is a continuing execution, raising the debt out of the profits, on which the bishop is ruled from time to time to return the sum levied, for after the writ is actually returned, the authority of the bishop is at an end. For the form of the writ see Registr. 300. It issues after a common writ of execution sued out, and a return by the sheriff that the defendant is *clericus beneficiatus, nullum habens laicum fadum*, and is in the nature of a *levari facias*, but goes to the bishop of the diocese. 2 Inst. 4.

(b) His authority expires with the writ. If he levy after the return day by order of the plaintiff, they are both trespassers. *Vail v. Lewis & Livingstone*, 4 Johns. Rep. 450.

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such property is, by procuring a return of the execution and issuing an *alias*. A contrary practice would be mischievous and a fraud upon other creditors.

*The opinion of the court, therefore, is, that [*245] judgment of nonsuit be entered pursuant to the stipulation in the case.

Judgment of nonsuit.

CLINTON *against* CROSWELL.

In an action for a libel, the court will not, on the common affidavit, change the *venue* from the county in which circulated to that in which printed and first published.

THIS was an action for publishing a libel.

Hopkins, on the common affidavit, moved to change the *venue* from the city and county of New York to the county of Greene.

Riker, contra, read an affidavit by the plaintiff stating that he resides in New York, and that the suit was brought for the publication of a libel in a newspaper, published in the county of Greene, by the defendant, and which he saw exposed to the view of many persons in this city, and that the plaintiff verily believed the defendant was the editor or printer of said paper. On these facts it was insisted, that the affidavit of the cause of action arising wholly in the county of Greene was not correct, because wherever the paper circulated a right of action accrued. It was contended to be of more importance to an individual to protect his character against libels disseminated in the place of his residence, than in a remote part where he might be scarcely known. Therefore, in *Pinkney v. Collins*, 1 D & E. 571, the court refused to change the *venue* from the place where the libel was circulated to that where printed.

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Per Curiam. There is no ground for the application. The defendant can take nothing by his motion, and must pay costs to the plaintiff.[1]

Motion denied.

CANDEE *against* GOODSPEED.

If a non-resident plaintiff sue by warrant before a justice, and will not consent to an adjournment for more than three days, in no case can the justice adjourn over that time.

IN ERROR, on *certiorari*, from a justice's court.

The plaintiff was a non-resident, and the suit commenced by warrant.

The defendant, on account of the inevitable absence of a material witness, and after due diligence used to procure him, requested an adjournment for more than three days, offering the same security as is required by the 8th section of the ten pound act. The plaintiff refusing to [*246] consent to the delay, the *justice, of his own authority, adjourned over. This was alleged for error.

Per Curiam. The seventh section is too positive and peremptory to be got over. The justice had not any power to adjourn beyond the three days.

Judgment reversed.

[1] Change of *venue* in an action for libel dispersed in different counties will be denied, unless there is a decided preponderance of witnesses, *See Root v. King*, 4 Cow. 493; see *Nicholson v. Northrop*, 3 J. R. 189.

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ANONYMOUS.

Being a public officer affords no excuse for not going to trial, nor does his cause acquire any preference.

It was ruled that the causes in which public officers, such as the attorney-general, district attorney, and the like, are concerned, have no preference at the sittings or circuits; nor will such circumstance afford an excuse for not going to trial according to notice, or a reason to refuse judgment of nonsuit; it being the duty of public officers to provide other counsel when they cannot themselves attend; and if they do not, it is at their peril.

LIVINGSTON *against* HASTIE AND PATRICK.THE SAME *against* TYRIE.

A judgment recovered by the United States is a good consideration for a note to the district attorney, and not inquirable into in an action upon it by him, though satisfaction be not entered upon the judgment. A note given in the name of a firm for a private debt of one partner is void in the hands of the creditor, as against the firm, if given without the consent of the partnership, and even as against a friendly endorser, endorsing at the request of one of the firm, and not knowing the note was not given for a partnership debt.

THESE were two actions brought by the endorsee of the same promissory note. The first was against Hastie & Patrick as makers; the second against Tyrie as endorser. The facts in each were these: Hastie had become bail in a suit by the United States, in the district court, and judgment had been obtained against him on his recognizance. Being unable to pay it, the plaintiff (who was district attorney for the United States) agreed to take his own note

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with an endorser. Hastie on this, without the knowledge and consent of his partner, drew the note, on which the present actions were founded, in the name of the firm, and prevailed on Tyrie to lend his endorsement. The note thus drawn and endorsed was given by Hastie to the plaintiff, but satisfaction was never entered on the judgment. A verdict for the plaintiff having been taken by consent, in both suits, subject to the opinion of the court, the cases now came up and were argued together.

Robinson, for the plaintiff. The consideration for the note cannot be questioned. There was a *bona fide*, valid existing debt. That satisfaction was not entered is immaterial, as the note was only a collateral security, [*247] and in such cases the judgment *is always kept on foot till payment of the note. But allowing the debt due on the judgment not to be a sufficient consideration, there was a still further one; forbearance of execution. This being so, there was a legal basis for the contract, to the discharge of which one partner had a right to bind the other. That the act of one of a firm is obligatory on all, is a settled principle. But, however the case may be with respect to the suit against the makers, no objection to a recovery can be made in that against the endorser, for he can never enter into an investigation of the bill.

Harrison and Caines, contra. The plaintiff as a public officer could not take the note for a debt due the United States: and as he knew the consideration on which it was given, it is open to inquiry even by the endorser. But there was no consideration, as the forbearance relied on might have been instantly superseded by an order from the United States to proceed. It is true one partner can bind the other, but that is only in relation to partnership transactions. He cannot for a debt due in his private capacity give a note in the name of the firm. *Shirreff & another v. Wills*, 1 East, 48. The same principle applies to both cases.

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Robinson, in reply. The authority cited went on the fraud that was practised, and so do all the cases to the point relied on.

LIVINGSTON, J. delivered the opinion of the court. The first question made in this cause regards the consideration of the note, and the other the liability of Patriok, the instrument having been made for the private debt of Hastie, and delivered to the plaintiff, who knew it was not given on a partnership account.

Whether the mere want of consideration, even between the original parties, can be alleged against a promissory note, or a bill of exchange, may well be doubted. It is not necessary, as in other simple contracts, to state a consideration in the declaration; the instrument itself imports one, and in this respect partakes of the quality of a speciality. Nor is the plaintiff bound to prove his giving any value for such paper, unless when he sues as bearer of a bill, transferrable by delivery, and that under suspicious circumstances. *Grant v. Vaughan*, 3 Burr. 1518. No case can be found where the want of consideration alone has been admitted as a good defence. As against the payee, the maker, it is true, has been permitted to show, not a want, but a failure of consideration, and in all cases he may insist on the illegality of it. Chitty, in his treatise on bills, *says, that the want of consideration may [*248] be relied on, but not one of the decisions which he cites will bear him out.(a) In *Jefferies v. Austin*, the defendant was only permitted to show the note was delivered in the nature of an escrow, and it appearing that the condition on which it was to take effect had not been per-

(a) It has long been settled that between immediate parties to a note a consideration is necessary; of this the note is *prima facie*, but not conclusive evidence, though it turns the proof on the defendant to show there was none. *Brown v. Marsh*, Gilb. Rep. 154; *Jerome v. Whitney*, 7 Johns. Rep. 323. The whole of the reasoning of the learned judge, on this point, is extrajudicial, and, I say it with regret, is of no authority; nay, authority is against it. *Pearson v. Pearson*, 7 Johns. Rep. 26.

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formed, a verdict was found for him. Str. 674. Here the consideration, which had induced the defendant to make the note, failed, but if he had given it to the plaintiff, voluntarily, as a gift, and without receiving any value, this would hardly have been a good defence. So in *Puget de Bras v. Forbes and Gregory*, Esp. Rep. 117. Lord Loughborough allowed the defendants, in a suit by the payee of a bill of exchange, to show that it had been drawn before they had received any value from the persons on whose account it was drawn, who had since become insolvent, and that this was known to the payee at the time he took the bill, as the general and established custom of merchants, in regard to bills of this description. This decision in like manner, proceeds on the principle, that the inducement for drawing the bill being known to both parties, to wit, an expectation of funds from the principal, and that failing, it was unjust to exact payment of the defendant. The other case from *Espinasse*, only settles that the endorsee of an accommodation bill, who takes it knowing it to be such, can recover from the drawer no more than he has advanced on it. *Wiffen v. Roberts*, 1 Esp. Rep. 261. Nor does what Lord Mansfield says, in *Lickbarrow v. Mason*, prove anything more than that between the drawer and payee of a bill of exchange, the consideration may be inquired into to prevent either of the parties committing a fraud. This is not denied, and means nothing more than that the drawer will be allowed against the payee, and the endorser, against his immediate endorsee, to show what was its real consideration, on which the court will decide whether there ought to be a recovery or not. But it is not necessary, at present, to decide how far a total want of consideration will form a defence, because here there was a valuable one, and there is no pretence, on that ground, to avoid the note. Against Hastie a judgment had been recovered, in the district court of the United States for the New-York district. For the amount of this judgment, the present note was taken, payable in four months. As a

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prudent man, Hastie no doubt took a receipt from the district attorney, who must have been the attorney on record in the suit in which this judgment had been rendered, *expressing the purpose for which the note [*249] was taken, and, therefore, although the judgment was not cancelled, it would be satisfied by actual payment of the note, for which it was given as a collateral security, and so would the latter be discharged by paying the judgment. This is a common practice, nor are we bound to presume that the district attorney exceeded his powers, in consenting to a suspension of the execution, on receiving additional security. He probably acted in conformity to his instructions from government, but, at any rate, we are not to conjecture, as it is not in the case, that he acted without instructions, or in violation of them.

On the other point, which respects the liability of Patrick, there can be no difficulty. It is certain, that the power of one partner to bind the other is very great, and for the purpose of trade it should be so. When there is a known partnership, it is right that any one dealing with either of the partners, as such, should have recourse to all of them for his contracts, and if he abuse the confidence which his associates repose in him, strangers should not suffer. But it is not necessary for trade that this authority over each other should extend to matters totally unconnected with the objects of their association, and which it is impossible any articles of partnership could have contemplated. Were that the case, it would put an end to those connexions altogether. It can never be the intention of those who form companies of this nature, nor can it be the expectation of the world, that every partner is to pledge the general responsibility for his private debts, contracted before or after the partnership. When any one, therefore, takes a partnership note, from one of the company, for what he knows to be his particular debt, without consulting or apprising the other members of his intention, or obtaining their consent, there is no hardship in confining his remedy

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to the one whose debt it was.(a) This rule we adopt as one that will produce the least mischief, will prevent an improper use of the partnership firm, will confine persons, thus associated, within proper bounds, and will destroy every inducement in strangers to obtain, by practice or fraud, a security against the whole company for the individual debt of any member. The plaintiff here knew the note was given for Hastie's own debt, and it does not appear that Patrick consented to his name being used; the defendants, therefore, must have judgment.

In 1 East, 48, is a case decided on the same principle. *Two partners, prior to their connexion with another person, had contracted a debt, for which they afterwards accepted, in the name of the new firm, a bill, drawn by their creditor, who commenced a suit on it. The court were unanimous that the new partner was not liable on this bill.

There is also a case, decided by Lord Kenyon, at nisi prius, of *Arden v. Sharpe and Gilson*, (2 Esp. Rep. 524,) not very unlike this. Only the party who took the bill, endorsed by Sharpe and Gilson, was informed by Gilson, one of the partners, that the transaction was to be concealed from the other. The ground, however, on which his lordship decided, is the same which has been here taken. "The transaction," he said, "indicated that the money was for Gilson's own use, and not raised on the partnership account."

We think even in the second suit the plaintiff ought not to recover. The defendant endorsed the note of Hastie and Patrick, as their surety, believing it to be good against both, but in the preceding case, we have determined it not to be binding on the latter, and as the plaintiff, who was this defendant's immediate endorsee, knew on what account it was made, and must, therefore, be presumed to have

(a) The partnership not being liable. *Lansing v. Gains & Fin. Esq.*, 2 Johns. Rep. 300; *Livingston v. Roosevelt*, 4 Johns. Rep. 251.

Wilcox v. Woodhall.

known that it was good against Hastie alone, his action against the endorser cannot be sustained. If the plaintiff should have judgment in this second suit, the defendant, who is an innocent payee of the note, and was unacquainted with the circumstances under which it was issued would, in another action, be enabled to recover from the makers, and in this way the judgment just rendered would be defeated. For, although the party, who receives from one partner a note of the company, for his separate debt, cannot, according to this decision, maintain a suit against the other partners, it will not follow that a holder of the note, unapprized of this circumstance, will labor under the same disability. As well, then, to prevent this consequence, as because the note is not such a one as the party supposed he was endorsing, the defendant must have judgment.[1]

Judgment in each suit for the defendant.

WILCOX against WOODHALL.

Stipulation by a counsel in the cause good.

THE court determined that a stipulation, (see vol. 1, p. 7, n.(a) in a suit by a counsel, in the cause, was as good and effectual as by the attorney on record.

[1] All the partners of a firm are bound by a note made by one of the partners in the name of the firm for his individual benefit, even though it be fraudulently put in circulation as it respects himself, if the note before maturity comes into the hands of a *bona fide* holder. *Wells v. Evans*, 20 Wend. 251; *Cuttsell Bank v. Stoll*, 15 Wend. 364; S. C. 18 Wend. 468, 17 Wend. 524, 22 Wend. 183, 3 Hill, 462; see cases 6 Hill, 114, 17 Wend. 524, 22 Wend. 183, 14 Wend. 144, 14 Wend. 133, 5 Wend. 475, 11 Wend. 75, 6 Cow. 497, 4 Cow. 282, 11 J. R. 544.

Waddington v. Chamberlain.—Mumford v. Col. Ins. Co.

[*251] *WADDINGTON *against* CHAMBERLAIN AND CLASON.

The court will renew a rule for an attachment if it has not been forwarded by the clerk in time to be duly served.

LAST term the court had, in this suit, granted a rule to show cause why an attachment should not issue against A. B., but from some accident in the clerk's office, in Albany, the rule had not been forwarded, so as to admit of serving a copy twenty days before the term.

Riggs, on these facts, moved to renew the rule for the attachment, which was

Ordered accordingly.

DAY *against* WILBER.

Vacating rules. See *Hildrich v. Harvey*, 2 Johns. Cas. 331.

THE court, consisting of only LIVINGSTON and TOMPKINS, Justices, said, very slight grounds would be sufficient to induce them to refuse vacating a rule, granted on argument, in full court.

MUMFORD AND MUMFORD *against* THE COLUMBIAN INSURANCE COMPANY.

Motion for judgment as in case of nonsuit must be in the next term after the neglect.

It was ruled, that judgment as in case of nonsuit for not proceeding to trial, must be moved for the next term after

Codwise v. Hacker.

the *books*, and the practice, according to the case of *Brandt v. Buckhout*, vol. 1, p. 113, was now confirmed.

N. B.—*Sanford* (United States Attorney) mentioned, that by the words of the act it might be moved for "at any time." But the court paid no attention to the remark.

CODWISE and LUDLOW against HACKER.

If in cross suits one has been referred, in which all may be obtained that can be gained by a reference in the other, the court will not refer such other, especially if there be a possibility that by so doing the report may be so apportioned as to throw the costs of both on one party, who by a decision of the court seems to have a right to a verdict in his favor in one of the suits.

THE plaintiffs had brought an action against the defendant for disobedience of orders. The declaration consisted of two special counts, and one for money had and received. A verdict having been rendered against the defendant, he, in February last, applied to set it aside, which being ordered, (Vol. 1, 526,) he instituted, for the recovery of his wages, money laid out, &c., a cross suit, in which the general issue only was pleaded. On this *being [*252] referred, it was agreed, by a consent endorsed on the plea, that everything might be shown in evidence in the same manner as if pleaded. At the reference the plaintiffs in this action perceived a report would probably be given in their favor, on the money counts in this suit, if they could also be referred, and, therefore, gave notice that they would apply for permission to refer the money counts, in this cause, on agreeing to no further prosecute the special counts for disobedience.

Riker (District Attorney) resisted the application as involving in the discussion points of law, and being made

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with no other intention than to endeavor to get the referees to apportion the balance they might report due, between the two suits, and thus give the plaintiffs costs on both. The full effect of this motion, he contended, had already been obtained; the now plaintiffs having, in the suit against them, set off everything they could against Hacker's demands. He argued that it was plain the motion was only to avoid going to trial on the suit which they saw they must lose, because their demands on the counts they now relied on were settled by the reference, and as to the special counts, the former decision of the court had determined those against them.

TOMKINS, J. Upon an affidavit of the plaintiffs, that a suit of Hacker against them was depending in this court, which had been referred, and that the referees, it was apprehended, were inclined to report a balance in their favor, if the state of the pleadings would admit of it, I granted an order, in vacation, to stay the filing of the report of the referees in the suit in which Hacker is plaintiff, to give the plaintiffs, in this cause, an opportunity of making the present application.

Upon the state of facts now disclosed, it appears to me improper to grant the plaintiffs' motion. By virtue of the consent endorsed upon the general issue, in the cause heretofore referred, the plaintiffs have their election to have the balance, which may appear due to them, reported in their favor, in that suit, or upon the trial of this cause, to recover such balance under the general counts. The circumstance that the trial of the cause will require the discussion and decision of important principles of law, affords a strong reason against the reference prayed for.

Let the plaintiffs take nothing by their motion, and pay the costs of resisting.

Motion denied.

 Williams v. Smith.

tices, were present at the application. The latter gave no opinion, having been concerned, nor did the other judges, as they had not heard the motion.

WILLIAMS against SMITH, President of the Columbian Insurance Company.

If a plaintiff delay his own verdict, interest will be taxed to him only down to the day when rendered. On granting a new trial, costs are allowed of course, unless when expressed otherwise, or for a misdirection. So if the application be denied, costs for resisting follow.

THE plaintiff in this cause had recovered for a *pro rata* freight. Thinking himself entitled to a verdict for the whole, he, in May term last, (*ante*, 13,) moved for a new trial, which the court refused, but said nothing as to the costs of application. The questions now were, whether the defendant should be allowed them; and whether, in taxing the general costs, interest should be allowed beyond the day on which the verdict was given?

Per Curiam. The costs of resisting the motion go to the defendant of course.(a) As to the interest, the plaintiff has himself been the means of delaying payment. The calculation, therefore, must be carried no further down than to the day on which the verdict was rendered.

N. B.—In another cause, between the same parties, the court said, that the granting new trials was always on payment of costs, unless otherwise expressed, or when for the misdirection of a judge; in which latter case they abided the event of the suit.

(a) Exceptions to the rule, that the *prevailing* party is entitled to them. *Green & Mosher v. Beale*, *post*, 256; *Williams v. Green*, 3 Calnes' Rep. 129; *Woods v. Hart*, 3 Calnes' Rep. 96. See *ante*, vol. 1, *Gilliland v. Morell*, 155, n. (b.)

Ferris v. Smith.

FERRIS against SMITH.

After a second commission has issued, with leave to go to trial notwithstanding, the court, on special circumstances, since discovered, will vacate the rule as to going to trial, and allow a further time for the return.

IN this cause a commission had issued to examine a witness in France. Pending this, a letter was received, giving information that he was then a prisoner in England. At the next term an application was made for a second commission to be transmitted to England, which, after an ineffectual opposition, was granted, but not to prevent bringing on the cause at the circuit. Previous to this another letter was received, specifying the witness to be in [*254] confinement in a town near Liverpool, and evincing that his testimony was almost conclusive on the question.

Bogert, on these facts, and stating that the commission had been sent, without a knowledge of the exact spot where the witness was, moved to vacate that part of the last rule permitting the plaintiff to go to trial at the next circuit, and to allow eight months from the time the commission issued for its return.

Ordered accordingly.

Green v. Beale.

GREEN and MOSHER *against* W. and T. BEALS.

If one of two partners, without any authority from the other, execute a joint bond and warrant of attorney in the names of both, it is void as against the partner who did not sign; but if judgment and execution be thereon entered up and sued out against both, the court will not set them aside on the application of him who did sign, nor even of him who did not sign, but with respect to him they would order that no execution should go against his person or goods. Such bond and warrant of attorney is good against the party executing, who, on a joint bond so signed, may be sued separately, and if the other partner be proceeded against upon it, he may plead *non est factum*. If an execution be sued out for more than is due, the court will not, merely on that account, set it aside if it appear that the sheriff has received instructions, though not endorsed on the writ, to levy only what is actually owing, but the defendant, though his application be denied, will be entitled to costs if it do not appear that the directions to the sheriff were given before levy made.

THIS was an application to set aside a judgment and execution.

Knott, in support of the motion, read an affidavit by Thomas Beals, stating that he had, for a debt due from him and the other defendant, executed for himself and partner, to the plaintiffs, a bond and warrant of attorney without any authority from William Beals, to sign for him. That these instruments were entered into upon condition of not being enforced unless William Beals, who had absconded, should do any act which might tend to embarrass the partnership funds, and defeat the claims of the plaintiff and other fair creditors. That since the giving the above securities the deponent had paid the plaintiffs a large sum of money, notwithstanding which, and notwithstanding William Beals had done nothing to endanger or affect the property, the plaintiffs had entered up judgment on the warrant of attorney, sued out a *fieri facias* for the whole amount, and made an actual levy.

From these facts, he contended, the judgment and execu-

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tion must be vacated *in toto*. The bond and warrant were joint; and it is a settled principle that one partner cannot bind another by deed. *Harison v. Jackson and others*, 7 D. & E. 207. Therefore, as the instruments were entire, and the proceedings were against both, there could be no apportionment, and the whole must be set aside as void. The conduct of the plaintiffs was against good faith, and fraudulent as to William Beals. On this ground the court invariably interferes in a summary way. 1 Stra. 40 Doug. 196.

Riggs, contra, read affidavits from the attorney in the cause and one of the plaintiffs, positively denying that the securities were executed on condition, and affirming them to have been absolute, for a *bona fide* debt on notes of hand over due; they admitted, however, that a payment had been subsequently made, and execution sued out for the full amount expressed, without any endorsement [*255] to levy a less sum, but stated *that a letter had been written to the sheriff mentioning the sum received, with instructions to levy only what was actually owing.

This last circumstance, he said, was equivalent to endorsing the *fi. fa.* with the amount due. On the other points he observed that however true the principle, that one partner cannot bind another by deed under seal without a special authority, still he who does sign is bound, and cannot come forward to have vacated that which is obligatory on him. The applicant here was the party that had executed, who could not be relieved against his own voluntary act, on a *bona fide* consideration. This, he argued, was evident from considering what the court would do was the motion on behalf of the other partner. They would vacate the securities only as to him. *Motteux v. St. Aubin and others*, 2 Bl. Rep. 1133; 1 Dall. 119, establish every position.

Green v. Beals.

LIVINGSTON, J. The grounds of the application are, 1. That the bond and warrant, on which the judgment was confessed, were executed by Thomas Beals for himself, and in behalf of his partner, William Beals, from whom he had no authority for that purpose.

2. That judgment was entered in violation of an agreement, or understanding of the parties, at the time of giving the bond.

3. That the execution has issued for too much.

Our power of granting relief against warrants of attorney unduly obtained, or improperly executed, even after judgments are entered, is not denied, so that nothing remains but to examine whether sufficient reasons have been assigned for a summary interference in the present case.

It is settled in England, (7 D. & E. 207,) notwithstanding an opinion of Lord Mansfield, at *nisi prius*, to the contrary, that one partner, in consequence of the general authority derived from the articles of copartnership, cannot execute deeds for the other.^(a) Were it otherwise, they would be enabled to dispose of the real property of each other, and to create liens on it without end. This would render such connexions more dangerous than they already are, if not discourage them altogether. There can be no doubt therefore, that on a plea of *non est factum*, a verdict must have

(a) Unless the other be present, and concur, (*Ball v. Dunsterville*, 4 D. & E. 313,) or the partner executing have an authority for that purpose, either under seal, (*Williams v. Wainmole*, 4 Esp. Rep. 220,) or given by parol at the time of the execution of the instrument, after it has been seen and approved of by the other. *Mackay v. Bloodgood*, 9 Johns. Rep. 285. But as over the partnership effects each partner has by law an implied authority to bind the other, a fair disposition under seal is obligatory on all; and on the same principle a sealed release by one is operative against the whole, (*Pearson v. Hooker*, 3 Johns. Rep. 68;) and may, therefore, it would seem, be pleaded as the release of the firm. See *Manhattan Company v. Ledyard*, 1 Gaines' Rep. 192, n. (a) A receipt given for a partnership debt by one partner by way of set-off and in discharge of a private debt is, if there be not any collusion or fraud, a bar to an action by the firm; *consequenter supra Henderson v. Wild*, 2 Camp. 561.

Green v. Beals

been found for the defendants, and that it would be our duty to relieve William Beals, were this a motion at his instance, or on his behalf. But, as a judgment has been entered on this warrant, and for a fair and just debt, and the complaint proceed from the very person who executed the bond for his partner, we are not disposed, although [*256] though *we assent to the decision cited from D. & E. to listen to it.

This is at any rate the bond of Thomas Beals; and although joint in terms, yet being void as it respects William, a separate suit might be brought against the former. If so, we see no reason for affording him relief against this judgment merely because the other partner's name be subscribed to it without any authority. It is permitting him to allege his own turpitude to get rid of that part of the contract which is his own, and ought to be binding on him. Even if the other partner were before us, we should not think it necessary to vacate the judgment, but on the authority of the case in 2 Bl. Rep. 1183, only direct execution not to be served on the person or property of William Beals, and that only Thomas Beals' interest in the joint property should be disposed of. But such interposition must not be spontaneous. William Beals himself must apply for it. Perhaps he is satisfied with what his partner has done.

With regard to the second objection, it is enough to say that the fact is not made out with sufficient certainty to justify our setting aside the proceedings on that ground. Still less does it appear that more is directed to be raised by this execution than is due; and were that the case it would be no reason to set aside the judgment. If the plaintiffs neglected to give the proper credit in the first instance, they have since corrected the mistake; but there being reason to believe the execution issued for too much, there being no endorsement on it, and it not appearing when the sheriff was directed by letter to levy only what

 Bergen v. Boerum.

was due, the defendants, although their motion be denied, are entitled to, and must have, the costs of this application.

KENT, Ch. J., THOMPSON, and SPENCER, Justices, absent.
Motion denied.

 BERGEN and GARRITSON *against* BOERUM.

If a judgment has been entered, and execution sued out for the penalty of a bond, the court will set aside the execution, and order satisfaction to be entered, on payment of the debt, and interest due on the condition, with the costs of the suit, though the bond was given for a larger debt than that mentioned in the condition, and for the overplus, a promissory note had been given, which is unpaid, and for which there was, at the time, a verbal agreement, execution should be taken out if it was not duly honored. No more can be levied by an execution, on a judgment upon a bond, than the sum due on the condition, and costs. A notice signed with the christian and surname of an attorney is good, though it have not the addition of "attorney for," &c. A motion cannot be supported by an affidavit, not served, though the matter it contain be not known till the day of application. A copy ought to be served, and a motion made on the next day.

EVERTSON moved to set aside the execution issued in this cause, and to have satisfaction entered on the judgment upon an affidavit stating that the amount of the debt in the condition of the bond, on which judgment had been confessed, had, together with interest and costs, been paid to the sheriff, *who nevertheless threat- [*257] ened to go on and sell, in pursuance of the directions he had received, as the *fi. fa.* issued was on a judgment for the penalty, and the writ endorsed to levy more than the sum paid.

He insisted that the sum in the condition is the actual debt. By the words of our statute(a) it is made so. It allows the bringing into court the principal, interest, and

(a) 1 Rev. Laws, 349, s. 6.

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costs, in bar of the suit; and though the terms of the law are, that it be "pending the action," which may be now deemed to be at an end, yet in Rich. K. B. 211, and 1 Sell. 359, 360, it will be seen that the courts of common law will extend the equity of a statute in cases like this, and *that* by virtue of their general controlling power over their own judgments.

Emott, contra, read counter-depositions, setting forth that the bond and warrant, on which the execution was issued, were given to secure a debt larger than the condition, for the surplus of which a promissory note was made by the defendant, payable at 30 days, under an agreement that if it was not duly honored, the amount might be levied by execution, on the warrant of attorney; that the plaintiffs had also other demands against the defendant, for *bona fide* debts, on notes of hand, to the amount of which the sheriff had been directed to levy, but that the whole did not exceed the penalty of the bond, the condition of which, together with interest and costs, had not been fully satisfied, as, on calculation, two dollars appear to be still due.

From these circumstances, he argued, the court had no jurisdiction. At common law they could not relieve against the penalty, after forfeiture, because that, after a lapse of the day, was, on legal principles, the amount of the debt. To mitigate this severity, it was necessary to have recourse to a positive statute. The provisions of that, however, went, as had been acknowledged, to authorize an interposition while the suit "is pending," not afterwards. This court proceeding under the statute, cannot go beyond it, and equity alone is the tribunal to which recourse can be had. These principles are to be collected from 5 Bac. Abr. 256, title Obligation. If, however, the court can interfere, it must be on equitable principles alone. What, then, would equity do? It would refuse to relieve from the penalty, unless all fair and just debts were discharged. The defendant, therefore, should have sworn the other

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sums endorsed are not due. He is not otherwise entitled to the favor he asks. He that seeks equity should *do it. Francis's Max. 1. The whole debt also [*258] is not paid, and it appears from the affidavits that the defendant is insolvent.

Evertson, in reply, was stopped by the court.

Per Curiam. We have no doubt of our equitable jurisdiction. It would be attended with the most mischievous consequences to allow collecting more than is due on the condition. It would be trying the equity of the case in this way. It is against the very form of the contract, and liable to great abuse. It would be a deception on the world, for the condition which is to discharge the judgment is on record. If, therefore, it was to reach to other demands, it would be impossible to know what would satisfy the debt. As to the two dollars, *de minimis non curat lex*. Take the effect of your motion, with the costs of this application and those of that to the judge for the order to stay proceedings.

Motion granted.

* * An objection was taken to the notice of motion, for being signed, simply, "Nicholas Evertson," without the addition of "attorney for the defendant," but the court paid no attention to it.

N. B.—It was ruled in this cause, that an affidavit containing new matter, could not be read in support of a motion, though the facts in it were not known till the day of bringing it on. The party should have served copies, and moved the next day.

Day v. Wilber.

DAY *against* WILBER.

If judgment of reversal has been pronounced, and on the next day the court improvidently order an amendment in the point on which it has proceeded, without notice of the application having been given, it will so far vacate such order as to grant a rule, admitting the party to show cause against such amendment.

THE plaintiff had, in the last term, obtained a reversal of the judgment below, for a defect in the return of the oath administered to the constable. See *ante*, p. 189. So soon as the court had delivered their opinion, the plaintiff's counsel left town. The next day, Gold, on affidavit that the error arose from a clerical mistake in copying, obtained a peremptory order to amend. After the plaintiff had, on the judgment pronounced, made up his record, he was served with a copy of the order to amend. The application now was to vacate that order.

Simonds, for the plaintiff. The rule for amendment was irregular, because obtained without notice of motion. The court may certainly annex to its decisions any [*259] qualifications it *pleases, and the whole constitutes one judgment. But when it is pronounced without those qualifications, it becomes the unqualified right of the person in favor of whom rendered, and cannot be altered without giving him an opportunity of being heard, because that would infringe upon what the law has given him. The court, therefore, has not power to make such an *ex parte* rule, as that of last term, in favor of the defendant. For want of notice, then, it must be vacated.

Harrison, contra. The court has power over its judgments during the term in which pronounced. It is in law but as one day. It was in the breast of the court till the expiration of the term, and might be modified if they pleased.

Anonymous—Jackson, ex. dem., —, v. —.

Per Curiam. We ought to alter the order complained of, and give till the first day of next term to show cause against the amendment, that in the mean time all proceedings stay, and that the defendant's attorney serve a copy of Mr. Gold's affidavit on the attorney of the plaintiff.

Rule to show cause only.

ANONYMOUS.

To warrant issuing a commission before issue joined, there must be special circumstances disclosed.

JONES moved for a commission, to be directed to New Orleans, though issue was not joined, nor the writ returned.

Per Curiam. There must be peculiar circumstances^(a) to warrant the application. The intercourse between this and New Orleans is constant. It is impossible to judge whether the testimony asked for will be material, before declaration, or knowing the point in contest.

Motion denied.^(b)

JACKSON, ex dem. —, against —.

Notice of a non-enumerated motion may be for an enumerated day, if accompanied with an excuse for not being given for the first day.

THE notice of motion to set aside a writ of possession

(a) *Brain v. Rodelicks and Shivers*, vol. 1, p. 73, S. P.

(b) A commission will be granted to examine a soldier in the service of the United States who is expected to be ordered away, if such a fact be shown by affidavit. *Cardall v. Wilcox*, 9 Johns. Rep. 266.

Watson v. Delafield.

was not for the first day of term, nor for a non-enumerated day.

Riser, contra. It is bad. Though the court allows notice of a non-enumerated motion to be for another day than the first, still it ought to be for a non-enumerated day.

Per Curiam. If the excuse is sufficient, the notice is good, though for any day, notwithstanding the court will hear it only on a non-enumerated day.

Motion granted.

[*260] *J. & S. WATSON *against* DELAFIELD.

A commission cannot be applied for without notice, though the decision rendering it necessary, be pronounced on the last Friday in term.

ON a motion for a commission, *Pendleton* objected because notice of the application had not been given.

Hoffman. The decision making it necessary was pronounced only yesterday, and this is the last day of term.

Per Curiam. That would have afforded a sufficient reason for not giving the regular notice, but notice is requisite in all cases. Take nothing by your motion.

Motion denied.

Anonymous.—Pomroy v. The Col. Ins. Co.

ANONYMOUS.

A new count on the demise of a new lessor, may on terms be added to declaration in ejectment.

THE application was to add a new count on the demise of a new lessor.

Per Curiam. Let the plaintiff have leave on the following terms. The defendant have twenty days, after service of the declaration thus amended, to elect whether he will continue to defend the suit, and if he shall so elect, then he is to have the costs usual in cases of amendment in other suits, and twenty days from the time of making such election to plead *de novo* or abide by his former plea. If the defendant elect to proceed no further, then to receive all his costs up to the day of making such election.

Motion granted.

POMROY *against* THE COLUMBIAN INSURANCE COMPANY.

On an application for a new trial on account of newly discovered evidence, if the information be stated to have been given by A. B., a person of character and reputation, affidavits to show he is not worthy of credit may be read.

BOGERT applied, in this case, for a new trial, on an affidavit of newly discovered evidence from A. B., a man of good character and reputation.

Starr offered affidavits to show the person from whom the information was derived was a man not worthy of belief, and, in the present instance, actuated by motives of revenge.

Anonymous

Bogert objected to their being received, because it was trying a man's character, in a collateral way, by surprise, when he could never expect to be called on to support it, and must, therefore, be unprepared.

Per Curiam. This person comes forward in the light of a witness: every man who does so puts his general character in issue. You have invited inquiry [*261] by stating him to be a man of character and reputation. Every witness at a trial is equally unprepared; we do not, therefore, see why we may not question his credibility as much as if he was before a jury. Read the affidavits.

SPENCER, J. I dissent entirely from this determination. I think it may lead to very oppressive and serious consequences. A man's character is to be sifted, not from what he appears and says himself, but from what others relate of him. He may not even be present when the information he gives is made use of, and must, therefore, be surprised by such an inquiry. I cannot agree to trying a man's reputation in this manner.

N. B.—Documents consisting of certificates and other papers were received in support of the person's character.

ANONYMOUS

In ejectment it is of course to amend the declaration by adding a new count on the demise of a new lessor.

JONES, on a mere notice of motion and affidavit of service, moved to add a new count, in a declaration in ejectment, on the demise of a new lessor. It was opposed. But,

Anonymous.

Per Curiam. Take your motion on the usual terms. If the opposite side abandon his defence you pay all costs.(a) If he vary it, the costs of the former pleading.

Motion granted.

REGULA GENERALIS.

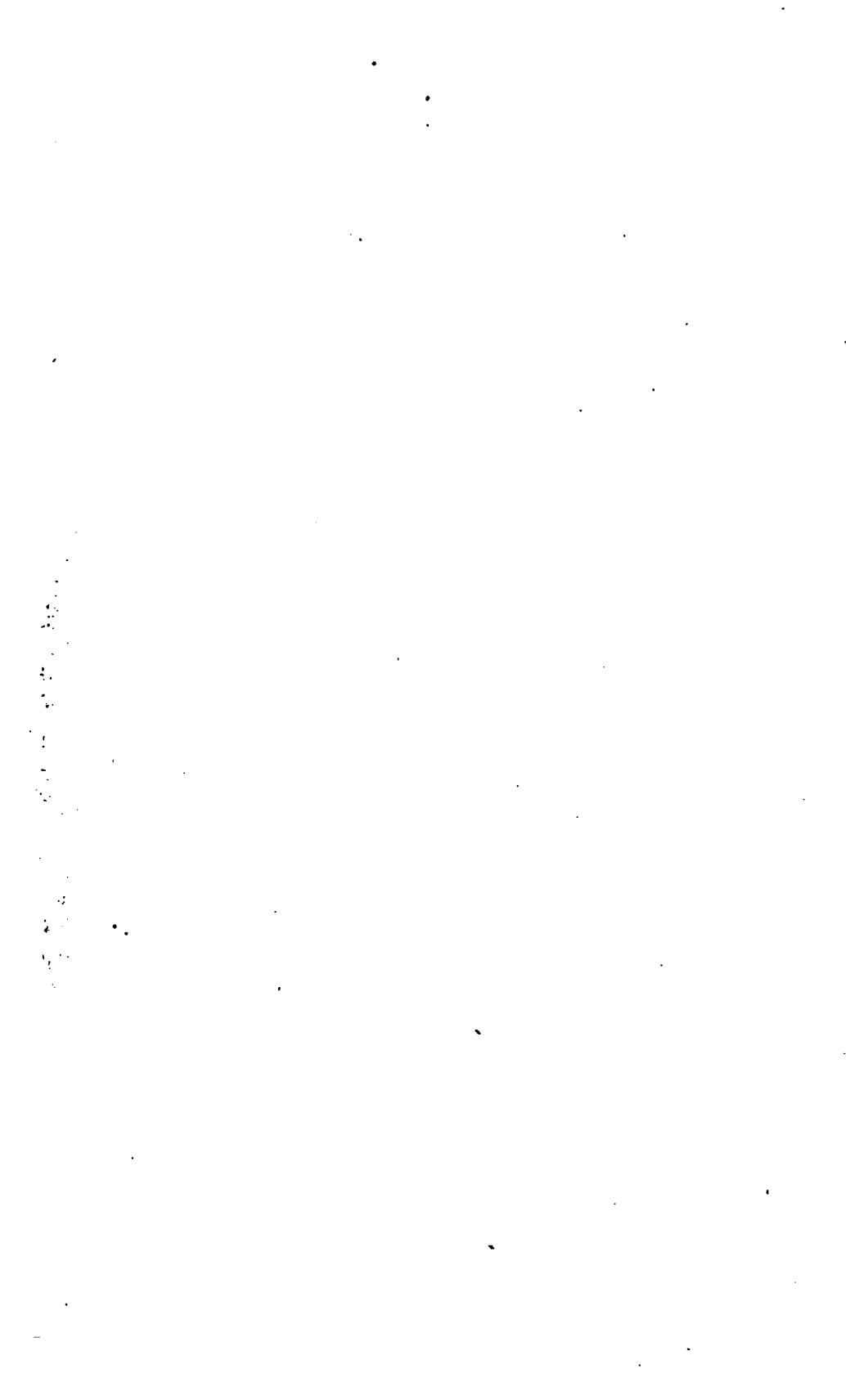
ORDERED, that every person who hath been, or hereafter shall be, admitted to the degree of attorney of this court, and has practised as such for three years, shall be admitted also as counsel in this court, and that the third rule of October term, 1797, as far as the same is repugnant hereto, be repealed.(b)

(a) *S. P. Wimple and another v. M'Dougal*, Cole Cas. Prac. 49, citing *Jackson, ex dem. Quackenboss v. Dennis*; *Jackson v. Kough*, 1 Caines' Rep. 251; *Webb v. Wilkie*, ib. 154, n. (a)

(b) The rule of November term, 1803, by which persons who had been admitted to the degree of counsellor at law in any other of the United States, and had practised as such for four years, were entitled to be admitted as counsel in this state, was, by the rule of 17th February, 1809, annulled. 4 Johns. Rep. 192.

By rule of August, 1806, it was ordered that no person, not being a natural born or naturalized citizen of the United States, shall be admitted as an attorney or counsellor of this court. 1 Johns. Rep. 528.

END OF NOVEMBER TERM



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN FEBRUARY TERM, IN THE TWENTY-NINTH YEAR OF OUR INDEPENDENCE.

J. AND T. WALDEN *against* J. AND R. LE ROY.

If a vessel be, from sea damage, obliged to bear away to a port of necessity in order to refit, the wages and provisions, from the moment of bearing away to the period of sailing on her original voyage, constitute a subject of general average, the proportion of which may be recovered in an action of *assumpsit*, by the owners of the ship, against the proprietors of the cargo, and of course for which the underwriters on the cargo are liable. *Barber v. Phoenix Ins. Co.*, 8 Johns. Rep. 307.

ASSUMPSIT by the plaintiffs, owners of the ship Thomas, against the defendants, proprietors of her cargo, for their quota of a general average, for wages and provisions, incurred and expended, from the time of bearing away to Norfolk, in consequence of a leak sprung in a violent gale of wind, which, on consultation with the crew, rendered it necessary to make for the nearest port, in order to refit.

The demand extended from the moment of bearing away to the period of sailing in prosecution of the original voyage, including the time of detention in unloading, repairing, and loading again. The case was submitted without argument,

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the only question being whether, under such circumstances, wages and provisions were subjects of general average?

KENT, Ch. J. delivered the opinion of the court. In the case of *Leavenworth v. Delafield and Dale*, (vol. 1, 573,) decided in this court in February, 1804, the vessel was captured and carried into port, where she was detained four months, and then liberated. It was there held that the wages and provisions of the crew during the detention, were to be brought into a general average. In this [*264] case the vessel was forced into port by injuries received at sea, which rendered it necessary for the general safety to go into the nearest port to repair. The two cases appear, at first view, to be sufficiently analogous to admit the application of the same rule, but there is no direct determination on the point in the English law. As far, however, as the question has been incidentally noticed, the opinion seems to have been in favor of the plaintiff's claim, in this case, to general average for the wages and provisions of the crew during the detention at Norfolk. There were some *nisi prius* decisions before Lord Mansfield, which may be considered as having a remote bearing on this question. In the case of *Fletcher and others v. Poole*, tried at the sittings in 1769, the vessel was forced into Minorca to repair, and, in an action against the insurer on the ship for wages and provisions expended while she was detained to refit, his lordship held that they were never to be allowed against the insurer, as a charge against the ship. Park, 58. But afterwards, in the case of *Lateward v. Curting*, in which the same question arose, Lord Mansfield admitted there were exceptions to the rule; as, when it appeared that the expense was absolutely necessary, and occasioned by some of the perils mentioned in the policy. Park, 125; Marshall, 464. This last case has been considered by the two authors last cited, and also by Buller J. in *Da Costa v. Newnham*, as containing an approbation, by Lord Mansfield, of the rule, that if a vessel went into

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port to repair from necessity, those expenses would become general average. I do not think, however, that much if any reliance ought to be placed on *nisi prius* opinions, so destitute of explicitness on this point, and in which the question, as to general average, does not appear to have been mentioned; and the same remark will apply to what fell from Buller, J. in *Robertson v. Ewer*, 1 D. & E. 182. The case of *Da Costa v. Newnham*, 2 D. & E. 407, is, however, material and important on this subject. In that the decision of the court of K. B. approaches very near to a sanction of the above expenses as a general average. It was held, where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. It was not requisite in that case to decide whether the seamen's wages and provisions should become general average, as the crew had been discharged; but the two cases are very analogous in principle, and *have been so regarded by Park and Marshall. [*265] I cannot perceive any sound distinction between them. But Abbott, p. 282, 283, states the question now under consideration as one upon which a reasonable doubt may be entertained, and on which our law books furnish no decision. He seems rather to intimate his own opinion to be against the allowance of the wages and provisions of the crew, although he admits, in p. 280, the expense of unloading and shipping should be sustained by general contribution. He submits the following distinction for consideration; that if the damage to be repaired be in itself an object of contribution, the incidental expenses ought to be so, otherwise not. The opinion of this author is very respectable, as he is one of the most learned and accurate of the English writers on commercial law. But it is to be observed he states the question as doubtful, and gives no decided opinion, and his distinction is liable to this objection, that it is repugnant to the rule he had already laid down,

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that if it be necessary to unlade the goods in order to repair the vessel, the expense of that unlading, warehousing, &c. go into a general average. Those expenses are certainly as collateral or incidental to the repairs, as the provisions of the crew during that detention, and the wages of the workmen employed are still more closely incidental to the repairs, and yet we see that they are allowed, while the repairs are not.

The question, upon the whole, may be considered as still open in the English law, but with a pretty evident inclination in the courts, and in most of the writers, to apply the rule of contribution to the present case. The Law Merchant is, however, the general law of commercial nations; and, where our own positive institutions and decisions are silent, it is to be expounded by having recourse to the usages of other nations. This has been the maxim from the time of the Rhodian law to this day.

Ricard, the Amsterdam merchant, says, that if a ship is forced by tempests to go into port to repair, and cannot continue the voyage without hazard to all concerned, the wages and provisions of the crew, from the day it was determined to seek the port, to the day of the vessel's departure again on the voyage, are to be brought into gross average. Beawes has adopted this passage from Ricard; for he lays down the rule in the same words, vol. 1, 161, and it is to be observed that Beawes is frequently regarded and cited, in our books, as an authority in the English law. [266] Emerigon, also, vol. 1, 625, says, *that there is the same rule in the maritime jurisprudence of France; and it appears from the case of *Newman v. Cazalet*, cited in Park, 424, to be the established rule in the commercial court at Pisa. As far, then, as the foreign writers and decisions are to influence, the rule may be considered as established in favor of the plaintiffs' claim. The case reported in the text of the civil law, Dig. 14, 2, 6, and upon which some of the foreign civilians have established their doctrine, was merely whether the expenses of the repairs

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themselves should be made a general average, *nautæ pro dampno conferre debeant*, and it was decided they ought not. The present decision will not, therefore, interfere with this case in the civil law. Independent of these foreign authorities, I cannot distinguish this case in principle from that of *Leavenworth v. Delafeld and Dale*. It is equally necessary, in both cases, that the mariners should remain for the purpose of proceeding to the port of discharge, as soon as the inevitable misfortune, the *casus fortuitus*, creating the delay is removed. The cargo might be sacrificed at the intermediate port, if the crew were not to be detained, and the expenses of their detention, being for the common benefit, ought to be apportioned as a common burden. On the analogy, then, between this case and those decided in this court, and in England; on the ground of the foreign decisions, in a case appertaining to the commercial law of nations; and on the reason of the case, as coming within the spirit of the rule for contributions, we are of opinion for the plaintiffs.

LIVINGSTON, J. This cause is submitted, without argument, on a supposition that it is governed by that of *Leavenworth v. Delafeld*, 1 Caines' Rep. 573, decided in this court in February term, 1804. The two cases, however, differ greatly.

We have as yet only said, that, on a detention *after capture*, about which there is no diversity of sentiment among foreign writers, moneys expended for provisions and wages, while the vessel and cargo *are reclaiming*, shall be borne ratably by all the parties whose property is in jeopardy. For this we assigned as a reason, that capture being a misfortune, happening not to the *ship alone*, but also to the cargo and freight, and *that* without any defect attributable to the vessel, or fault in her owners, it was reasonable all parties should contribute to the costs and charges incident to averting a condemnation, among which those for wages and provisions were indispensable. It may also be doubted

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whether in such an event the captain be bound to [*267] keep the mariners, and whether it be *not matter of contract among the underwriters on these several subjects, that expenses of this kind, which are incurred for *the recovery*, and not for repairing of the property, shall form a gross average. But neither of these reasons can apply here. The disaster which compelled the *Thomas* to bear away for Norfolk, befel the ship alone. She sprung a leak, to repair which, so as to pursue her original voyage, and thus earn freight, she went into the nearest port. It is true, it was for the defendants' benefit that this course was adopted in preference to letting the vessel sink. But this argument, if care be not taken, will prove too much.

If masts or a rudder be carried away in a storm, or by lightning, it will be for the benefit of all parties concerned that they be replaced; but it was never yet contended that the owner of goods was to bear any part of such expense. So if a vessel touch at a port in her voyage, and *there* be struck with lightning, it is as much for the shipper's benefit that she be repaired, as if the misfortune had happened at sea, and yet, will it be said, that in such cases, too, these charges shall be ratably paid? To prevent this argument, drawn from the benefit which shippers receive, from misleading us, its application should be confined to advantages conferred which do not result from a previous obligation on the party from whom they proceed. If they be the effect of contract, or of an antecedent stipulated reward, as we shall presently see was the case here, it is idle to expect any other remuneration than that which the terms thereof prescribe. In the given case, the freight agreed on is all the compensation the plaintiffs were to receive, and in settling a suitable equivalent, they took into the estimate the very risk and expense, a part of which they now claim of the defendants. The detention of a crew after capture, may emphatically, and in the sense above mentioned, be considered as for the *common benefit*, because

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a technical total loss having happened, there is no further duty to keep them. They may be dismissed with prejudice to the insurance, but if these plaintiffs had discharged the seamen, and thus voluntarily broken up the voyage, neither the defendants, nor the assurers of ship or freight, would have paid them one shilling.

If the maintenance and wages of a crew, under such a disaster, be objects of general contribution, how is this to be reconciled with what is so clearly the contract of every owner of a ship, who takes goods on freight? Does not every charter *party, as has already [*268] been hinted, contain a covenant that "he will, at his own cost and charge, keep his vessel staunch and tight, and furnish her with *mariners, provisions, &c.* during the *whole voyage?*" Does not this engagement oblige him not only to provide a good vessel at the commencement of the voyage, but, if possible, to repair her as often as may be necessary, and to bear *all the expenses* occasioned thereby? Why, then, are these expenses to be separated? If by the charter party the owners of the ship have agreed to pay the whole, what right have they to ask any part of them from the merchant? And if any, why one part more than another? As well might a landlord, who for a certain rent had covenanted to rebuild, after injuries by lightning or other accidents, during the lease, ask of his tenant, on the pretence of having done him a service, to contribute towards so much of the expense as was occasioned by the wages of workmen and their provisions. No person would tamely submit to such an exaction; and yet, in what would his case differ from that of the defendants, who, on precisely analogous terms, were tenants of the ship Thomas?

Again, does not the right to freight, generally speaking, depend on completing the voyage? And how can this be done, in case of many accidents, unless the vessel stop somewhere and repair them? The defendants in this very case might have insisted either that the Thomas should be repaired, or on the plaintiffs' finding another ship; and in

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case of refusal to do either, they might have demanded their goods, as they were under no restraint, (as in *Leavenworth v. Delafield*, arising from capture or other cause,) and have sent them on by another opportunity, without having anything to do with the wages or provisions, or other expenses, incident to the repair of every vessel. It is nothing to the shipper of goods, as it respects the charge he is at in the transportation of them, whether the voyage be lengthened by adverse winds, or by the springing of a leak and going into port. In both cases the owner of the vessel is put to greater expense for wages and provisions; but in neither is the price of freight increased, which will become the case indirectly and very often, if any part of this additional burden be to be borne by him.

This claim, to say the least, is novel in our country; nor has it yet been made with success in Great Britain, although instances of this nature must occur every day;

never has a shipper been compelled, in that country, [*269] to contribute towards *disbursements of this kind.

The sense and practice of the mercantile world must, therefore, notwithstanding theoretical speculations, be against it, and these, in points otherwise doubtful, are entitled to consideration. In England, I understand through a channel which leaves no doubt of the information being correct, that in a case like the present, these expenses are *never* brought into a general average. A merchant, if a contrary practice be introduced, will never be able to calculate, with any certainty, the amount of his freight, nor will he know how to cover himself by insurance. There is no hardship in throwing the whole of these expenses, in ordinary cases, on the owner of the ship, and letting him look to his policy on the vessel for repairs put on her, and to his underwriters on the freight, for any *extra* expenditure for wages and provisions, which, being a deduction from her gains or earnings, ought naturally to be paid by those who have underwritten that subject. It is best, where it can be done, and where it does not inter-

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fore with certain well known rules, which have been established in the case of jettisons, and some other losses which are voluntarily incurred, for the sake of all, to let every subject bear its own loss. Every man will then know the extent of his liability, and act accordingly. In cases like the present, no injury can arise in making the separation, while frauds may be practised under a contrary rule. On the smallest accident the owner, or master, will be tempted to go into port, nor will he have any great inducement to shorten his stay there, so long as he be permitted to employ the crew in repairing the injury, (which they will oftentimes be competent to do,) and to victual and pay them at the expense of the owner of the cargo, who has relied on his contract to do all these things himself.

For these reasons I am for confining a general contribution for *extra* wages and provisions, to a case of capture, or where a vessel goes into port to avoid an enemy, or where some other step is taken by the master, *without any previous injury to the vessel alone*, evidently for the benefit of the whole, and with the view of escaping from an impending peril. All these cases rest on the same principle. No particular accident having happened to the vessel, which it is the owner's special duty and interest to repair, there is no reason why he should personally bear a heavy loss, which, in most of the cases put, is *voluntarily* incurred, to prevent a general one, greater still. Hence, it will result, and, perhaps, a safer *rule [*270] cannot be followed than the one suggested by Abbott, which is, that if the injury to be repaired be not of *itself* an object of gross average, (and certainly the stopping of a leak falls not within this description,) neither shall any of the incidental or consequential charges become so. If a shipper be not obliged to find materials, or carpenters, to repair injuries, from tempest, or stranding, why should he be taxed to pay or victual the crew? Obvious as this difficulty be, no writer has hitherto attempted its solution. A merchant suffers enough by the detention

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of his goods. If they come to a falling market, in consequence of a protraction of the voyage, or if damaged, or totally ruined by the springing of a leak, he cannot apply to the owner of vessel or freight for the smallest indemnification. He must bear the loss himself, or look to his own insurance.

But the principle, on which the plaintiffs expect to succeed, is supposed to be in the case of *Da Costa v. Newnham*, 2 D. & E. 407. The crew being discharged at the place of repair, the question which now occurs was not directly agitated, nor was any thing more determined, than that the underwriters, on a vessel, are liable for "wages and provisions of workmen hired to refit her." This seems a self-evident proposition; for as these repairs are put on the subject which they have insured, not only should they pay for the materials, but for the labor bestowed on them. To get rid of this responsibility, it was urged that the sailors being employed for this purpose, "they were bound to work without a further allowance," and the court, with all the counsel, admit this would have furnished a valid defence for underwriters on a ship, provided it had been true in point of fact; but those of the crew, who had been hired after their discharge, were not regarded as hands belonging to the vessel, but as ordinary workmen. The manner in which the court and counsel express themselves merits attention, and goes a great way in deciding the present controversy in favor of the defendants, if a point not immediately litigated can be regarded as settled by any thing which judges may say. If these wages had been paid to the sailors as such, the plaintiffs' counsel allowed the defendant would have nothing to do with them. "But the fact," say they, "is otherwise. At the time the repairs were going on, many of the persons, indeed, who had served on board the ship were hired, but it was in the capacity of laborers, and not of sailors." The defendant's counsel, also, without denying the liability of their client, if these men were to be con-

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sidered as common workmen, rely altogether on their being seamen, and therefore not entitled to extra pay. Ashurst, Justice, agreed to the law as stated by the defendant's counsel, but not to the fact. "As to the charge for the sailors' work, had they remained as such," says he, "on board, it would be fair that a deduction should be made, but it appears that the crew were discharged immediately on the ship's coming into port, and there is no reason why they should not afterwards be employed as laborers, in making the repairs, as well as any others." Is not this, in plain terms, saying that the wages and provisions of seamen, under a calamity of this kind, cannot fall on the underwriter of a ship. Buller, too, although he refers to a passage in *Beawes*, for the foreign law, on which he gives no opinion, lays hold of the same distinction, to make the underwriter liable; "for," says he, "the crew had been discharged, "and those men had been employed as common workmen." I have been thus particular in examining this case, because it is by some supposed an authority in favor of the plaintiffs, whereas, according to my understanding, we find recognized in it, without any qualification, the rule on which the defendants here rely, that the wages and provisions of a crew, during a detention to repair, cannot be brought into a general average. In this view it is a very strong case in their favor, and so it has ever appeared to me. But this is not the only British authority of the kind. Lord Mansfield, in the case of *Fletcher and others v. Poole*, (Sitt. after Easter, 1769, Park, 52,) declared, that wages and provisions, expended while a ship is refitting, after a storm, could never be allowed against an insurer on the vessel. Much less, then, can they be demanded of an owner or underwriter on goods. *Eden v. Poole*, Sitt. after Hil. 1785; Marsh. 61; 1. D. & E. 127. Buller, too, on a trial before him, ruled, that a charge for wages and provisions, during a detention like the present, could not be recovered on a policy on the ship and goods, but that the freight alone was liable for it.

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It is also settled in *Robertson v. Ever*, that the expenses of wages and provisions, occasioned by an embargo, which is a stronger case than this, cannot be recovered on a policy on the ship. This case is cited, although it be that of an embargo, for the purpose of quoting what fell from Mr. Justice Buller, and which applies strongly, and immediately, to the point before us. "If," says he, "the ship had been detained in consequence of an injury received in a storm, though * the underwriters must have made good the damages, yet the insured could not have claimed the amount of wages or provisions, during the time spent in repairing. The court," he proceeds, "only look to the subject-matter of the insurance. Here the ship was safe, and the wages and provisions are no part of the thing insured." It will at once be perceived that this reasoning applies with double force against rendering an owner of goods, or their underwriters, liable for expenses of this kind.

If there be any foreign author who thinks differently, his dictum will not be found to be supported by the best and more ancient writers on the law of insurance. Vol. 1. 624. Emerigon, after inquiring "whether the expenses of repair and continuing in port to refit, after an accident of this kind, are to make a general average?" informs us, that the Rhodian law decided in the negative, and then cites many celebrated authors, (Faber, Vinnius, Duarenus, Kuricke, Loccenius, Devicq, Roocus and Marquardus,) who approve of, and adopt this decision. The reason they assign is, "that such expenses are incurred for the purpose of enabling the vessel to pursue her voyage, rather than with a view of preserving the merchandise."

The same principle, says this profound lawyer, seems to have dictated the eleventh article, respecting freight, which obliges "a shipper to wait while a vessel is repairing, or to pay freight," but the ordinance does not, he continues, require him to contribute to the expenses of refitting, or those

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caused thereby. The same decision, he adds, is to be found in the laws of Oleron.

Thus far there appears but one opinion among elementary writers, for although they make no particular mention of wages and provisions, it is evident from other expressions, they must have included them in the exemption, to which an owner of goods was entitled. Being a charge as much arising out of the peril encountered as any other, they could perceive no reason for a distinction, the merit of which is, perhaps, exclusively due to Ricard, who is mentioned by Emerigon as the first who undertook to differ from all the authors whom he had just named. He then cites his opinion, which no subsequent writer has ventured to approve in its whole extent; for the repairs of a ship, after a storm, are by him brought into general average, as well as seamen's pay and provisions. In truth, he excepts nothing, but includes every expense occasioned by the disaster. Indeed, if he be right in throwing any one of these items into a general average, he *must, [*278] probably, be so throughout. For why shall the pay of the crew be a general, while the wages of the workmen are a particular, average? Or why shall the provisions of the former fall under one description of averages, and those of laborers under another? Or why must the cost of a mast be borne by the owner himself, or his underwriter while the charge of keeping the sailors, while it is putting in, must be divided between freight, ship, and cargo?

Ricard, no doubt, found it difficult to make a distinction, and therefore determined not to differ by halves from the jurists who had preceded him. As he is perhaps the only writer (for Beawes only copies what he says) who is found to maintain this doctrine, I shall be excused for adhering to an opinion which is certainly sanctioned by far the greater part of those who have left us their sentiments on the subject. This will appear to be the case to any one who will be at the trouble of consulting *Emerigon*, who, it

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is proper to observe here, admits that the practice of the French courts of admiralty, contrary, however, to the civil jurisprudence of the country, conforms to the opinion of Ricard as far only as respects the expenses of unloading and reloading and the wages and provisions of the crew.

Another argument against making these expenses a matter of general assessment, arises from the extreme difficulty and embarrassment which must ever attend the adjustment and collection of them. To value the vessel, freight, and goods, so as to do justice, is never an easy task. In the case of a general ship, and fifty or more shippers, as may well happen, what trouble will not the owner have to discover the just value of every man's interest, and what disputes, vexation, and delay must he submit to, before he receives one half that is due to him? To recover one hundred dollars for wages and provisions, he may have to look to as many shippers, and have a controversy with every one. All this may be avoided by making these expenses, as naturally they are, a particular average.

My apology for the length of this opinion will be found in the importance of the question, than which few can occur more interesting to the mercantile world. I sincerely hope that the inconveniencies, which are apprehended from a practice under the rule which it has been thought fit to adopt, may exist in imagination only.

Upon the whole, as the injury which happened [*274] here was *not in itself an object of general contribution; as the plaintiffs were under contract to *repair, victual, and man* their vessel, throughout the voyage, or lose their freight; as the defendants received no benefit but what the plaintiffs were under positive stipulation to confer; as their *own* and not the common interest was the sole object; and as a contrary rule may produce great inequality, embarrassment, and delay, my opinion is, that the charge for these *extra* wages and provisions is a

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particular average, to be borne by the freight only, and that, therefore, the defendants ought to have judgment.(a)

Judgment for the plaintiffa.

HENSHAW *against* THE MARINE INSURANCE COMPANY.

Where the *termini* of the voyage insured are preserved, it is only a deviation to touch at any intermediate port; and though it be resolved on *before* the voyage commence, it is not on that account an altered, or different voyage from the one described in the policy, and the insurer will be liable for any loss before arriving at the dividing point. Wages and provisions are subjects of general average from the time of being obliged to bear away to a port of necessity in consequence of injuries received, and recoverable under a policy on the ship. If the points intended to be relied on in argument have not been subjoined to the case made, service of a copy of them on the judges and adverse party at the time of bringing on the argument is sufficient.

On a policy of insurance upon the body of the brig *Friendship*, "at and from Newry, in Ireland, to New York."

Previously to the sailing of the vessel, the master, in conjunction with the agents of the assured, entered into a written contract to land some passengers at Halifax, in Nova Scotia, under a penalty of five hundred pounds. The vessel, however, cleared out at Newry for New York, but in proceeding down the St. George's or Irish channel, and before she had reached the dividing point to turn off to Halifax, she struck on a rock, in consequence of which it was, after consultation, deemed necessary to bear away for Dublin, in order to refit. For the expenses, it became indispensable to take up money on bottomry. After doing which, and completing her repairs, the vessel sailed on her voyage by the way of Halifax, where she landed her pas-

(a) See *Leavenworth v. Delafield*, 1 Caiens' Rep. 518, n. (a.)

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sengers, and afterwards arrived safely at New York, the port of her ultimate destination.

A *relicta* having been given, a case was made, subject to the opinion of the court whether the plaintiff was entitled to recover the amount of the money taken up on bottomry, and whether the wages and provisions from the time of bearing away until she was in condition to proceed, and the expense of loading and reloading the cargo, and all others occasioned by that necessity, should, or should not, be a subject of general average?

Hoffman, for the defendants, objected to the cause being brought on, because the points, on which the plaintiff meant to rely, were not added to the case served upon him.

[*275] **Jones*, contra, then tendered to him a statement of the points, and at the same time served the judges with copies. This he contended was sufficient.

Hoffman, in reply. The rule ordering points to be subjoined to the cases made, was intended as much for the case of the opposite counsel as of the court.

Per Curiam. It is sufficient to serve the points on the opposite party at the time when the case is delivered to the court, and when the motion is made to bring on the argument.(a)

Jones, for the plaintiff. Our first position is, that the voyage insured, and that on which the vessel sailed, are the same; therefore, as the loss took place before arriving at the dividing point of the two voyages, the insurer is liable. The contract to touch at Halifax, was no more than an intended deviation, and did not amount to a different

(a) In every case the party who is to open the argument must deliver to the court and to the opposite counsel the points he means to rely on. *Metcalf v. Newson*, 3 Johns. Rep. 542.

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voyage. It is not denied that a deviation avoids a policy; but then it is only as to subsequent, and not as to previous losses. For these last the underwriter continues chargeable. These principles are of long standing, and to be found well settled in the cases of *Foster v. Wilmer*, and *Carter v. Royal Ex. Ass. Co.*, 2 Stra. 1249. In *Murdoch v. Potts*, (Sitt. at G. II. after Trin. 1795, before Lord Kenyon,) which may be relied on by the defendants, the decision turned on the fact of the ulterior voyage being concealed. And in *Woodridge v. Boydell*, Doug. 16, Buller, J. recognizes the law as settled by the authorities referred to. In that case the voyage insured was never intended. The *termini* were not the same. This, according to Lord Mansfield, is the criterion to determine whether the voyage pursued be only a deviation, or a different voyage. When the *termini* are the same, any intermediate course is only a deviation. *Kewley v. Ryan*, 2 H. Bl. 348, reviews all the former determinations, and confirms them. In *Middlewood v. Blakes*, 7 D. & E. 162, the decision went on the ground of a positive order, previous to the voyage, depriving the captain of a right to pursue it in the most advantageous manner. This was held to increase the risk by taking away the right, which the insurer had, to the master's judgment and discretion. This very case, however, acknowledges all the others, and Lord Kenyon says, he would not have determined as he did, could he have been brought to suppose the decision in *Kewley v. Ryan* would be at all affected. The question as to general average has already been determined by the decision in *Walden v. Le Roy*, as against owners of goods, and it is conceived that *the same principles must govern against under- [*276] writers on a vessel.

Hoffman, contra. The determination in *Kewley v. Ryan* was evidently contrary to Lord Kenyon's opinion, as expressed in the subsequent case of *Middlewood v. Blakes*. He does, indeed, avail himself of a distinction, but which

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amounts to nothing. This, therefore, shows that the law is not settled even in England; we may then be allowed to investigate this point on principle. If so, the English adjudications cannot be supported. Millar, when speaking of the reasons on which insurance law should proceed, is deserving of the highest consideration. In page 892, he says, "to vary in the smallest particular from the original plan of the voyage, constitutes an *alteration*." The reasoning in this: a deviation arises after the voyage is begun; an alteration when the original plan is previously departed from. In 481, Millar puts this question: "Suppose the assured owners have taken on board a consignment to a different port than that specified in the policy; will it free the underwriter?" He thinks it ought, because it is "a variation in the plan of the adventure adopted previous to the commencement of the risk." He argues that an intention to alter the voyage destroys the contract. The agreement by the policy is to pursue the voyage in the most direct course. When it is to be prosecuted in another, it takes away the option of the captain and comes within the distinction, refined as it is, of *Middlewood v. Blakes*. The distinction, however, is purely fanciful; for, a voyage from Newry to Halifax, and from Halifax to New York, can never be the same voyage as one from Newry to New York. It is incongruous to say that wages and provisions are subjects of general average, when the owner is bound to have his vessel in such a situation as to carry her loading, and his compensation is in his freight.

Jones, in reply. The policy here is *at and from*. The risk, therefore, was commenced. Allowing, then, the distinction taken as to previous and subsequent alterations, we are still entitled to recover within the words of the policy.

KENT, Ch. J. delivered the opinion of the court. The court are of opinion that the previous intention to touch

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at Halifax did not make it a different voyage, as the *termini*, as well as the substantial object of the voyage described in the policy, and of the voyage upon which the vessel sailed, were the same. This point is considered as settled in the English law, by the cases of

**Carter v. Royal Ex. Ass. Co.*, 2 Stra. 1249; *Thet* [*277] *Jusson v. Ferguson*, Doug. 346, (361 of 8d ed.);

Kewley v. Ryan, 2 H. Bl. 348, and *Middlewood v. Blakes*, 7 D. & E. 162. The same question arose in this court in the case of *Silva v. Low*, decided in October term, 1799. The voyage there, as described in the policy, was from Wilmington, in North Carolina, to Falmouth; but, previous to sailing, the captain declared his intention to touch at New York for seamen; and one question in the cause (which was twice argued) was, whether the sailing under that declared intent was a distinct voyage? All the above cases were reviewed and considered, and upon that question the majority of the court were of opinion that it was to be deemed still the same voyage. The second point was decided this very term in the case of *Walden v. Le Roy*. The only difference in the two cases is, that *this* is an insurance on the ship, and *that* was an insurance on the cargo. But this makes no difference in the application of the rule for contribution. The opinion of the court accordingly is, that the plaintiff is entitled to recover, and that the wages and provisions of the crew during the necessary detention, at Dublin, to repair, go into a general average.

LIVINGSTON, J. As to the first point, whether this were anything more than an intended deviation, I concur in the opinion just delivered. Both in England and in this country it is well settled that an intention, however strong or well ascertained, to touch at an intermediate port, not mentioned in the policy, does not constitute a different voyage, but only an intention to deviate. Were this *res integra*, doubts might reasonably be entertained; but it is no reason

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From the opinion delivered on this point, I dissent. In the case of *Walden v. Le Roy*, decided this term, my reasons were assigned at large, why an owner or underwriter of goods, ought not to contribute towards a reimbursement of *expenses of this nature. For the same reasons, underwriters on vessels can have nothing to do with extra wages and provisions. So it has been settled in England, and the practice both there and in this country is in conformity thereto. As these expenses occasion a diminution of freight only, that subject alone must be considered as loser, and its underwriter, if there be any, called on for an indemnity. An insurer of a vessel might as well be applied to for a contribution towards a loss occasioned by an extra consumption of provisions, or an extra charge for wages during violent storms or contrary winds, which had protracted the voyage three or four months beyond the usual period.

We now go much further than in *Walden v. Le Roy*. We there only said, that wages and provisions expended during a detention to refit, after a storm, should be brought into a general average. But here we determine that "all other expenses occasioned by this necessity," are to become a general average including (for the expression is sufficiently broad) materials for repairs, as well as for the hire of carpenters and laborers. An owner of goods will, therefore in future, be bound not only to pay and feed the mariners, but if every expense occasioned by a storm must be paid as a general average, and so we are now determining, he will have to purchase materials and find workmen to repair a ship in which he has no interest. This, if it be intended to go thus far, is introducing an entire new principle into the law merchant, which will be mischievous and unequal in its effects, and which no advocate for the doctrine of general average, excepting Ricard alone, has ever before maintained. Certain it is, that no owner or underwriter of goods, with us, has ever yet paid towards the repairs of a vessel injured by storm, but hereafter this as well as every

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other expense (for there is no exception in this case of anything) must be borne by him in proportion to his interest on board. This innovation in practice, however beneficial to the owners of ships, will not be much relished by the great body of merchants, who, besides paying large sums, for which they have hitherto not deemed themselves liable for real and necessary reparations, will be exposed to many frauds, on the part of those who will now have a right and an interest to repair their vessels at the expense of others.

My opinion is, that the plaintiff is not entitled to recover the wages and provisions of the crew, from the time of bearing away until the vessel was repaired and in a condition to pursue her voyage, and that none of the expenses occasioned by that necessity are to be borne as a general average. [*280]

Upon these principles judgment should be entered only for the sum of 650 dollars; but the opinion of the court is, that the verdict is right, and the plaintiff must have judgment accordingly.

Judgment for the plaintiff according to the verdict.

THE UNITED INSURANCE COMPANY OF NEW YORK *against*
 ROBINSON AND HARTSHORNE. Affirmed in error, 1
 Johns. Rep. 592.

After an abandonment and payment of loss, a purchase of the property insured, by the agent or correspondent of the underwritten, though made after condemnation, is for the benefit of the insurer, if he elect; therefore the proceeds of a purchase so made, and any cargo in which they may be invested, become, if he pleases, his property, and he may maintain trover for it, against the assured.

TROVER to recover the value of a quantity of wine and brandy, in which a verdict was taken for the plaintiffs subject to the opinion of the court on this case.

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The plaintiffs underwrote 10,00 dollars on two policies of insurance, on goods shipped by the defendants, to Cadiz, St. Lucar, or Malaga, consigned, conditionally, to the master, with directions, in case of accident, to enclose bills of lading to the house of O'Connor, in Cadiz, or St. Lucar, and to that of Grevigne & Co. in Malaga, to be accompanied with instructions to follow the orders given by the defendants to their master. Off Cadiz the vessel, being warned not to enter that port, bore away for Malaga, in sight of which she was captured by a French privateer, carried in and there condemned by the French consulate, as good and lawful prize. During the proceedings in the consular court, the captors had neglected to pump the ship, and it was apprehended, from her leaky situation, that the cargo, consisting of sugar and cocoa, had received some injury. Without opening the hatches to ascertain its extent, the house of Grevigne & Co. at the request of the captain, who did not know of the insurance, purchased the cargo for 15,565 dollars, through the intervention of a sworn broker for the benefit and on the account of the "defendants, and whomsoever else it might concern." But in this transaction Henry Grevigne deposed, his firm considered themselves as acting in the capacity of agents for the defendants, to whom they would have had recourse for payment of any loss that might have accrued on the purchase. This, however, did not take place; for the cargo sold for 80,174 dollars, which sum, after deducting the 15,565 dollars [*281] paid to the captors, Grevigne & Co. invested in wine and brandy, which they shipped on account and risk of the defendants, who received and sold the articles thus remitted, contending they had a right to retain the amount, notwithstanding they had, on advice of the capture, made an abandonment to the plaintiffs, who accepted of it, and paid the full amount of their insurance as for a total loss. The question submitted to the court was, whether the plaintiffs were entitled to recover?

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Either party to be at liberty to turn the facts stated into a special verdict.

Riggs, for the plaintiffs. The transaction in Malaga, though done for the benefit of the defendants, must enure to that of the plaintiffs; for the purchase can be considered in no other light than as in trust for the persons who, in judgment of law, might be deemed the owners. These the plaintiffs became by their accepting the abandonment and paying the total loss. The adverse party cannot say Greignue & Co. acted as agents for them, after having, in due form of law, passed the property to the plaintiffs. If the property, then, was theirs, any articles purchased with the proceeds of that property were theirs also. There are cases in which a purchase by the insured may be considered as a partial loss. In *McMasters v. Shoolbred*, Esp. N. P. 237, it was held that, as the assured did not abandon until after a recovery of the vessel, the sum at which she was purchased by the captain constituted only a partial loss.^(a) But that a purchase by an assured does not stand in the way of the underwritten, to recover for a total loss, has been recognized in this court. In the present case, the cession of the property by the defendant, its receipt by the plaintiffs, and payment to the defendant, as for a total loss, according to his claim, vested the interest in the company. For it is a settled principle, that an abandonment made and accepted transfers the property. Allowing no just cause of abandonment did exist, yet if accepted and paid for, it is conclusive. The present question is not whether we could have been compelled to accept the abandonment, but whether, as we have paid the amount of our subscription, we are not purchasers of the subject insured? If so, then we are entitled to the benefit of the property invested and sent here. 2 Marsh. 522, 523.

(a) It was there held the assured could not abandon, as there had been a purchase by his captain. Park, 167.

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Randall v. Cochran, 1 Ves. 93 are authorities for our claim.

Hoffman, contra. By the case of *Saidler and Craig v. Church* (see the case, vol. 1, 297, n.) it was thought the assured could make no purchase but for himself. That principle was somewhat qualified by *Abbott v. Broome*. [*282] See the case, vol. 1, 292. *The question again presents itself, whether the assured cannot, under peculiar circumstances, purchase for the benefit of himself, without any reference to the underwriter. It will be observed that the transaction between the assurer and assured was closed; and that the defendants stood as mere strangers purchasing on their own credit. It was not on that of the cargo purchased, for Henry Grevigne expressly says that his house would, on any deficiency, have had recourse to the defendants. The plaintiffs would not have been liable. How, then, can they set up a claim to any of the returns? Suppose the whole had sunk at sea, the defendants must have sustained the loss. So, had the purchase proved a losing bargain, the underwriters would never have been called on. But as the event turns out profitable, though the buying of the cargo was a matter of mere speculation, the plaintiffs set up a right to demand the emolument. This, however, they cannot maintain, unless they can show their liability to us for any sum that we might have paid Grevigne & Co. The rule, to operate, must be equal. It is to be observed too, that the purchase was not by the captain, the mutual agent of the insurer and insured. It was by a correspondent of the defendants, and this distinguishes the present from any other of the cases on this question. But allowing the plaintiffs entitled to recover, it is not the value of the articles here, but that at which they would have sold in Malaga. Park, 164. Therefore we certainly are not to account for any profits on the cargo which may have been made here.

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Riggs and *Harrison*, in reply. By accepting the return cargo the defendants have adopted the acts of the captain, who, from the intimate relation between assurer and assured is the agent of both parties. In case of accident he becomes, though without privity, the agent of the assurer. Whatever is done by him in good faith, is obligatory on the underwriter, though the master have no knowledge of the insurance. Thus, a composition entered into for salvage, to avoid the expense of libelling, binds the insurer. So does a ransom paid; and, should the goods or ship arrive after payment of the loss, the underwriter must bear whatever may further ensue from the property being inadequate to pay the charge upon it. By the conduct of the assured, the plaintiffs are shut out from applying to a foreign tribunal for restitution, and shall they lose the right to ask for their property, and then be refused the proceeds of their own? Besides, we hold, that had the purchase turned out a losing bargain, we should have been bound [*288] by this *bona fide* act of the captain. We, therefore, claim the benefits of what he has done.

KENT, Ch. J. delivered the opinion of the court. This is a clear case for the plaintiffs. Their claim is founded on sound principles in the law of insurance. The defendants abandon, and the plaintiffs accept and pay. They were then substituted for the defendants, and succeeded to the benefit of the acts of the agent abroad, in relation to the property in question. The master and merchants at Malaga acted, nominally, as agents for the defendants, but, in reality, they were agents for the party having the ultimate claim to the property. What they did was, undoubtedly, founded on previous instructions from the defendants, and on the connexion that the defendants had with the property, as former proprietors, and existing claimants. When the defendants abandoned the ship and cargo, and received their indemnity from the plaintiffs, they renounced all concern in the interference of their agents, and transferred to

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the insurer the result of that interference. This is settled doctrine in respect to abandonment. The present case is analogous to that of capture and subsequent ransom, where, upon an accepted abandonment, the whole benefit of the composition, and the effects reclaimed, go to the insurer.

There is no ground for considering the purchase by the house of Greystone & Co. as made for the defendants, in the character of strangers to the property. It was made for the defendants as having an interest in it, and with intent to mitigate the loss. The law of abandonment applies to such a case with the greatest justice and good policy in making the previous instructions, and all acts of the agent enure to the insurer. To give to the insured a full indemnity on his policy, and also the advantages of these efforts of the agents to repair the loss, would be doubly injurious to the insurer. It would deprive him of the benefit of his substitution, tend to slacken the exertions of agents to recover the property, and invite them to resort to fraudulent speculations upon the loss. It cannot be admitted, that the condemnation at Malaga put an end to the interest of the insured, so as to render a purchase, by him, thereafter, equivalent to a purchase by a stranger. In the case of *M' Masters v. Shoolbred*, 1 Esp. Rep. 237, the vessel was condemned by the French consul, sold by him as a prize, and the captain purchased her at such sale on account of the owners. But

it was considered as so much property recovered
[*284] *by the assured, and it was likened, by Lord

Kenyon, to the case of ransoms. The condemnation, and change thereby of the legal title, was not considered as any impediment to the doctrine that the assured, by a recovery in that mode, had sustained only an average loss. That case differs from this in one particular only; that here was an abandonment and payment of a total loss. It was admitted in the case I have cited, that if the insured, upon the capture, had abandoned he might have recovered a total loss. But then upon the very principles of abandonment, (and which that case did not mean to question,)

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the property so recovered, to use Lord Kenyon's expression, must have enured to the benefit of the insurer. It is a principle perfectly well settled, that abandonment has a retrospective effect, so as to make the insurer to be regarded as the proprietor *ab initio*. . . The insurer is put in the place of the insured, and the latter is considered as if he had not existed, according to the language of some of the books. Putting out of view, as the case in *Espinasse* certainly does, any material operation from the fact of condemnation, I cannot see any difficulty in the question. Suppose there had not been a condemnation, but the insured had, by their agent, purchased, or recovered the property, immediately upon the capture, and before this technical change of title by condemnation, I apprehend there would, in that case, be no question but that the assured, when he abandons, parts also with the benefit of his repurchase. . . The consequences would, otherwise, be most unjust towards the insurer, and the insured would turn his contract from one of indemnity into one of gain. If the condemnation in this case creates no difficulty, no other exists. The insurer was not bound, unless he pleased, to accept of the purchase at Malaga; nor was the insured. The agent purchased at his peril. There can be no risk, therefore, that this doctrine will involve insurers in hazardous mercantile concerns. They have nothing to do with them, but at their election. After an accepted abandonment, they can, if they please, accept of the repurchase by the agent, and affirm his acts, or they may leave them to fall upon the agent. The French ordinance of marine has made provision for this very case of repurchase after capture, and it ordains that the insurers may take the composition for their own benefit, or they may, at their election, refuse to have anything to do with the repurchase, and content themselves with paying a total loss. So also, on the other hand, the assured may refuse to ratify the repurchase, and for this reason, says Valin, it behoves the agent to act with great circumspection and prudence. [*285]

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Ord. Art. 66 and 67; 2 Val. 159, 160. See also 1 Emer. 464, and s. 21. I agree that the insurer is always bound to decide promptly, whether or no he claims the benefits of the repurchase; but as that point is not drawn in question in the present case, I intend that no objection exists on that ground. The repurchases, authorized by the French law, are as applicable to cases where the vessel has been condemned as where she has not. For by the law of nations, as understood when these ordinances were established, a capture and carrying into port, or *infra præsidia*, so as to take away from the captured the hope of recovery, as effectually changed the property as a sense of condemnation will do at this day.

In the case of *Gross v. Withers*, 2 Burr. 694, the doctrine of capture underwent a very learned investigation; and Lord Mansfield, in giving the opinion of the court, observed, that if after condemnation the owner recovers, or takes his captured ship, the insurer can be in no other condition than if she had been recovered or taken before condemnation. The reason is plain from the nature of the contract. The insurer runs the risk of the insured, and undertakes to indemnify. He must, therefore, bear the loss actually sustained, and can be liable to no more. So that, if after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must bear the loss so actually sustained. He observes, in another place, that no capture by an enemy, though condemned, can be so total a loss as to leave no possibility of recovery. Page 496.

I agree, that after a condemnation, the property is changed, so that a complete title can be transferred from the captor to a third person. But this rule does not apply between insurer and insured, so as to authorize the insured to be that purchaser, at the very time of the loss, and with the express view of indemnifying himself against a part of it. If he does, and still claims a total loss from the insurer,

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he must tender to him the benefit of that purchase. This rule is founded on the clearest justice, and is essential to prevent fraud. As long as the property remains in the hands of the captor, although a condemnation has taken place, there is still the possibility of a recovery. There still exists, as a rod over the captor, the right of appeal; and this, and other circumstances *which [*286] may be peculiar to the case, will always induce the chance of a favorable composition and purchase, on the part of the claimant. That chance is valuable, and ought, on abandonment, to go to the insurer. In the present case, however, the assured takes his total loss from the underwriter, makes his favorable terms with the captor, and insists on retaining both. This is not to be permitted, and I cannot persuade myself that it ever was permitted by the insurance law of any country.

The case of *Saidler and Craig v. Church*, decided in this court, in July term, 1799, is an authority in point, and must govern the present case. That was an insurance on a vessel, which was captured, condemned, and afterwards purchased by the master, on account of the owners, of whom he was one. As soon as the capture was known, and before the condemnation and purchase, the insured abandoned, but after the purchase, the owners fitted out the vessel, and sent her on another voyage. The court held that the assured, by affirming the purchase of the captain, as their agent, had waived the abandonment, and turned the total into an average loss. That if the insured had intended to pursue their claim to a total loss, they ought not to have ratified the act of their captain, but left the insurer to reap, at his election, the benefit of that purchase. This case cannot be separated from the present one by any solid distinction; and I should be sorry to question, in any degree, the authority of that decision. The case of *Abbott v. Broome*, 1 Caines' Rep. 292, was not intended, in any respect, to shake the force of it. I took no part in the latter decision; but it appears, from the re-

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port of the case, that it was clearly to be distinguished, from that of *Saidler and Craig v. Church* (Vide, vol. 1, 308,) and the latter appears to have been uniformly considered by the counsel and court as a valid authority. I conclude, therefore, both from authority and principle, that the plaintiffs are entitled to recover.

LIVINGSTON, J. The more I reflect on the nature of this claim, the more extraordinary, not to say extravagant, it appears. I am at a loss to discover any ground on which it can be supported. Those relied on are, that the purchase of the cargo being in trust for its ultimate owners, the plaintiffs must be exclusively entitled to the profits, inasmuch as by the abandonment, and payment of a total loss, they became proprietors thereof. These [287] arguments proceed on the *hypothesis, that goods, even after condemnation, belong to the original proprietors, or, in case of abandonment, to the assurer, and that the assured and his factors continue, after such an event, his agents, and are authorized to purchase for him the whole, or any part of the property condemned. But neither of these positions will be found correct. After condemnation there is an end of the interest both of the owner and underwriter in the property confiscated, except so far as regards the right of appeal; and even in case of reversal of the sentence, neither party would receive the property in kind, but its appraised value, or the price at which it had been fairly sold. Thus, if an appeal had been successfully prosecuted here, the underwriters, in virtue of the abandonment, would have been entitled, at most, to the sum at which the captor sold the property, admitting the sale to have been fair, and could not by action of trover, or otherwise, pursue the property itself, the title to which had been thus changed by condemnation. The moment sentence is pronounced, the right of the captors to sell is complete, and to such a sale all the world are, or may be, parties. The assurer may buy if he please; so may the

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original proprietor, or any stranger. He who does so, does it at his own peril; and as the owner, in case he purchase, cannot throw the loss, if any, on the underwriter, so neither can the latter come in for the profits resulting from the bargain, unless, indeed, the assured continue, as is alleged, agent of the assurer. But whence is this authority derived? Is it from the policy? That confers a power only to sue labor, and travel, in case of misfortune, for the defence, safeguard, and recovery of the goods insured, without prejudice to the insurance."

From these terms it is evident the authority of the assured and his factors contends only to cases in which, by their exertions, the property may be rescued from an impending peril. That is, they may use all diligence, and incur any expense, on the underwriter's account, to prevent a condemnation. But never before was it urged that he, or his consignees, had a right to purchase property for the account and risk of the underwriter. Mischievous, indeed, would such an unlimited authority prove to the underwriters themselves. They would become merchants as well as underwriters, and be exposed to all the hazards to which the indiscretion or avarice of foreign agents, chosen by others, might expose them. They would never know when their liability on a policy ceased.

*After paying their whole subscription, as they [*288] have done here, they might be called on for a second loss, greater, possibly, than the first, occasioned by an imprudent speculation abroad, which they themselves, if on the spot, would not have made. What has been done in this case, shows the hazards to which they would be exposed, if the power of the assured or his agents be as great as has been asserted. Messrs. Grevinge & Co. first purchase the cargo, and that before its condition is known; they then sell it, and after reimbursing themselves, invest the balance in brandy and wine, for account of the defendants, to whom they are accordingly shipped. These brandies and wines are sold by the defendants in New York,

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and because a profit has accrued, the plaintiffs very modestly claim it. But let the case be reversed. If there had been a loss, which might well have happened, in a transaction somewhat complicated, would the underwriters have been willing to make it good? If the Apollo's cargo, as was supposed, had been greatly damaged, if the markets had fallen at Malaga, and a great loss had ensued in that way, or by bad debts; if the Apollo had been shipwrecked on her return to the United States, and a second total loss had thus taken place, or if the brandy and wine had come to a bad market here, how would the plaintiffs, in either of these cases, have been astonished to be called on to make good the injury! They would have said, and there would have been no answering them, "Show us the authority under which you have been *trading* on our account. You have been speculating for your own benefit, and at your own risk, and are now for shifting the loss on us." If the defendants could not have compelled the plaintiffs to bear them harmless, and that they could not with me admits no doubt, there must be an end to this question. It cannot be endured, nor did the plaintiffs' counsel pretend, that underwriters, under circumstances of this kind, might silently wait until a close of the adventure, and then announce their election whether it should be on their account or not. It would be unjust, in the extreme, to let them participate in, nay, take the whole of the gains, without furnishing any portion of the capital, and yet exonerate them from all loss. *Qui sentit commodum, sentire debet et onus*, but here the underwriters would reap all the advantage, leaving the assured to bear the whole burden, and to submit to a loss without even a chance of benefit

[*289] to themselves. If it be insisted that the *plaintiffs must have made good a loss on this adventure, and such was the position of their counsel, why are we not told under what form of action this responsibility can be enforced, or on what clause in the policy, or on what other undertaking, on their part, it can be supported? The

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truth is, it is the first time a pretension of this kind has ever been advanced, and the plaintiffs themselves, although there be a profit here, will soon be convinced it is their interest to abandon similar claims in future. Whatever they may think, it will not be long before they will find themselves losers, if we give our sanction to the principle on which alone they can succeed. Numerous will be the claims made on them for bad speculations of this kind, while those which prove profitable will be carefully concealed from their view. Nothing is more common than sales for the benefit of parties ultimately concerned. This arises from the uncertainty which often exists, at the time of sale, as to the real owner. But seldom, if ever, have we before heard of a purchase on account of an uncertain vendee. A purchase is always made for the party whose money is employed. If so, what difficulty can remain as to the persons entitled to the profits in this instance? Did the plaintiffs supply funds? Not a cent. Would they have paid a bill drawn by Grevinge & Co. for the amount of the purchase? They would have regarded such a measure as an unwarrantable liberty in those gentlemen, and without ceremony have dishonored their draft.

But this demand, it is said, is not without precedent, and we are referred to a decision in England, and to another of our own, as authorities in point. The case of *M'Masters v. Shoolbred*, 1 Esp. Rep. 236, decided by Lord Kenyon at *sibi prius*, resembles in nothing the one now under consideration. It was an action on a policy on a ship which had been captured and purchased by the master, after condemnation, for the owners. As *no abandonment* had been made while the vessel was in the hands of the captors, and the loss continued total, Lord Kenyon considered the owners entitled to recover only the sum paid to the captors, with certain repairs that had been rendered necessary by the capture. The ship having come to the owners' possession, before an abandonment, or a suit brought, he considered it as immaterial how this restoration took place, and re-

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garded the *price paid* as the *quantum* of the loss occasioned by the peril insured against. So, says he, if a ship be sunk and weighed up again, and thus restored to [*290] the owners, they have *only a right to go for an average loss. It deserves notice, that even in this case his lordship, and the counsel, admitted "that the insured might have abandoned and thus made the loss total." It inevitably follows that the underwriters, if an abandonment had taken place, would have nothing to do with the purchase. If the defendants here were suing on the policy, and had made *no* abandonment in season, they would probably have recovered nothing more than the sum which they paid for the cargo; but having abandoned, they would, under this very opinion of Lord Kenyon, be entitled to claim as for a total loss, notwithstanding the purchase in Malaga. This decision, therefore, though cited by the plaintiffs, is an authority directly against them. They have been equally unfortunate in their allusion to the case of *Saidler & Craig v. Church*, in this court. That action was also *on the policy*, and whether the loss were total, or partial, was the only question. The vessel insured, having been captured, libelled in the admiralty, and condemned, was purchased by the master for the owners, who had fitted her out, and sent her on another voyage. The owners, on advice of the capture, but without knowledge of the condemnation or the purchase, abandoned to the underwriters. The court gave judgment as for a partial loss only, considering the sum paid by Saidler & Craig as the amount thereof. Although this was going further than was done in the case of *M^r Masters v. Shoolbred*, where there was *no abandonment*, it will not help the plaintiffs, for in neither of these instances were the vessels, when repurchased, regarded as belonging to the underwriters, but, on the contrary, to the assured, and because they had been restored to them at a certain price, the sum thus paid was considered as the injury sustained by the disaster, by a reimbursement whereof a complete indemnity

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would be obtained. If these vessels had belonged to the assurers, as it is pretended these goods did, they might have paid as for a total loss in the first instance, and then sold, or fitted them out themselves, or called on the plaintiffs for what they might have earned. But if this last decision be at all favorable to the present claim, it is greatly shaken, if not entirely overturned, by that of *Abbott v. Broome*, Vol. 1, p. 292. Being of counsel in both these causes, no opinion was given by me in either. The judgment last rendered, however, as it respects the effect of a purchase by the assured, is more consonant to the law of insurance than the principle adopted in the former.

It has *ever appeared to me that with a pur- [*291]
chase after abandonment and condemnation the underwriter has nothing to do; and that it is better for him it should be so, and I should have thought that since the case of *Abbott v. Broome*, such would necessarily have been our judgment were the question again to occur; for most certainly the facts there disclosed were much stronger against the assured's pretensions to a total loss, than those which appeared in the other, and yet they were determined to be well founded. Saidler & Craig did not purchase until after a capture and condemnation, to neither of which were they, in any degree, accessory; but the survey and condemnation, in the other instance, were produced on the application, and in a great measure at the request, of the supercargo, who was a part owner. In the first case to practice a fraud was impossible; and yet nothing is more easy, or more common, than to procure partial surveys and fraudulent condemnations, in foreign ports, when an assured wishes to break up a voyage at the expense of an underwriter. If, then, the case of *Saidler & Craig v. Church* be considered as no authority since that of *Abbott v. Broome*, which would have been my opinion, the plaintiffs are not only without the semblance of a precedent of our own to justify their demand, but as far as there is any analogy between the present case and that of

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Abbott v. Broome, the determination of this court is against them.

It was said, on the argument, that if the assured ransom, the underwriter is bound by his act, and must pay, whether it be a good or bad bargain. This is true, for such act being within his authority, he may, to avoid the greater evil of condemnation, or entire loss, pay a fair price for a restoration of the property, which then belongs to *himself* and *not* to the underwriter, who is only held to make good the loss occasioned by the capture, which is the sum paid as a ransom. The effect of a ransom is *not* to change the property, but to settle the *extent* of the loss. Upon the whole, I am of opinion, that after a capture, a condemnation, an abandonment, and payment as for a total loss, the assurer cannot call on the merchant to account for the profits which he may have made, in consequence of his agent's purchasing, with *his* funds, the cargo of the captors subsequent to a condemnation; but that such purchase, being with the money of the assured, must be at his risk, and for his exclusive benefit, and that the defendants must of course have judgment. 1 Caines' Rep. 303, n.(a)

[*292] *THOMPSON, J. not having heard the argument, gave no opinion.

Judgment for the plaintiffs.

AKERLEY *against* HAINES.

In trespass *quare clausum*, by a father, for debauching and getting his daughter with child, *per quod*, &c., the grounds of the action are the loss of service, and expenses of lying in; it is therefore no defence to show the daughter to be unchaste, unless the father has connived at her criminal intercourse.

THIS was an action of trespass for debauching and getting with child, Elizabeth, the daughter and servant of the

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plaintiff, by which he lost her service, was forced to expend a large sum of money in her lying in, and had, with all his family, fallen into disrepute.

In support of the action the daughter herself, against whose admissibility no objection was made, testified to the facts, after which the counsel for her father acknowledged that the money recovered in this suit was intended for her benefit, and there rested his case.

Against it the defendant attempted to prove that the daughter was a woman of unchaste character; but the credibility of the witnesses to this point was opposed by counter evidence on the part of the plaintiff. The counsel, however, against him, insisted that if the daughter was of bad reputation, antecedently to the defendant's connexion with her, the present action could not be maintained. The judge, before whom the cause was tried, thought otherwise, and charged the jury, that though they might believe in the previous want of chastity, they ought, nevertheless, to find a verdict for the plaintiff, but assess damages only for the loss of service and expense of lying in, and nothing for the loss of reputation. He could not, he said, see why a man who had the misfortune of having an unchaste child, should not be recompensed for an injury of this kind. He suffered as much by the loss of her service, and paid as much for her confinement, on her lying in, as if she had been virtuous and of fair character.

The jury, upon this, found in favor of the plaintiff two hundred dollars. Application was now made to set aside the verdict, for the misdirection of the judge, and as being contrary to evidence.

Ennott, for the defendant. The verdict is, evidently, not founded on the evidence. The action is trespass *quare clausum*, and it ought to have been shown that it was committed within the house. The testimony proved a former unchastity; and as the plaintiff waived damages, on his own account, it *became a question purely [*298]

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between the daughter and the defendant. Under this point of view, there can be no hesitation in saying the damages were excessive.

Cuines, contra, was stopped by the court.

Per Curiam. The direction of the judge was right. The daughter not being virtuous is no reason why her father, unless he connived at, and knew of her criminal intercourse, should not recover for the injury done to him, by the loss of her service and the expenses of her confinement. These are the grounds of this action.(a) On the other point, which is made, that the verdict is against evidence, we can form no opinion. The case is so drawn as not to disclose either the number, character, or particular testimony of the witnesses.

The jury, therefore, for aught we can know, were right in disbelieving the witnesses examined by the defendant, as to the daughter's character. If so, the damages are not too high. Let nothing be taken by the motion.

New trial refused.

CASEY AND LAWRENCE, assignees of NIXON, a bankrupt,
against J. BRUSH, surviving partner of S. L. BRUSH,
deceased.

Assumpsit cannot be maintained by one partner against another, for a balance due on a joint transaction, unless evidence be given of an express promise.

ASSUMPSIT by the plaintiffs, as assignees of Nixon, a bankrupt, for a balance of an account, due on a particular

(a) See *Seagar v. Sligerland*, ante, 220, n.(a.)

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partnership, in which the bankrupt, the defendant, and Samuel L. Brush were concerned.

The declaration contained a count for goods sold and delivered, the usual money counts, and an *insimul computassent*, between the bankrupt and Jesse and Samuel L. Brush. At the trial the plaintiffs established by Nixon, whom they released, that the defendant agreed with him to be equally interested in a vessel and cargo then equipping for a foreign voyage. At the time, however, when this took place, Nixon did not know there was then a subsisting partnership between the defendant and Samuel L. Brush; but, after 7 barrels of beef had been purchased for the expedition, Jesse Brush informed the bankrupt that he and his brother Samuel were partners in business, and mutually concerned in the present adventure. After this communication, the residue of the loading was purchased, taken on board, and the vessel sent on the voyage proposed. At her return Nixon drew out the [*294] accounts of the expedition, and delivered a copy of them to Samuel L. Brush, who neither objected to, nor admitted them, but said, "I can do nothing till my brother (the defendant) returns from Europe." On this evidence a motion was made for a nonsuit, because Samuel L. Brush was not one of the association when the connexion between the defendant and Nixon was first formed. This being overruled, the court charged, that the only consideration for the jury was, whether there was a sufficient evidence of a liquidation of accounts between Nixon and the defendant, or of an admission of the balance stated; if they were satisfied on these points, the plaintiffs would be entitled to their verdict for that amount, with interest; and thus the jury accordingly found.

An application was now made to set aside this verdict, and grant a new trial on the following grounds: 1. Because there was no evidence of a partnership between Nixon and the two Brushes when the transaction commenced; 2. If there was such a partnership, the action could not be

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maintained; 8. On account of the misdirection of the judge.

Boget, for the defendant. The contract respecting the adventure which has given rise to the present action, was between two parties only. This, therefore, can never affect a third person. In the case of *Dewer v. Macomb and others*, it appeared that after some of the parties had entered into a stock negotiation, Alexander Macomb was introduced, and this court determined that he could not be implicated in the original contract. The action here ought, therefore, to have been as between the original parties. The next point rests in some degree on the count on the *insimul computassent*. The evidence to that effect could not warrant the verdict. The mere receiving an account presented is not an admission of the balance it may show. It appears this was a partnership transaction. Till a dissolution, one partner cannot sue another. To maintain an action against one of a firm, there must be an express promise from the defendant. *Meravia v. Levy*, 2 D. & E. 468, n.(a). Here the reverse was the case, for the words used are tantamount to a refusal. Besides, they were spoken by a person not a partner (for he was not a party to the original contract) at a time when the defendant was absent in Europe. This, at the utmost, can be only a promise by implication, and on the principles laid down in the authority cited, could not sanction the charge given.

Johnson and Riggs, contra. If the parties were [*295]: partners, when the contract was concluded, they are bound by it, though they were not known to be connected. *Saville v. Robertson*, (4 D. & E. 725,) decided, indeed, on the inverse of the position, though the principle itself was admitted. It is on this ground that dormant partners are held responsible. It was not necessary, therefore, that Jesse and Samuel Brush should have appeared as

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connected in trade when the agreement was made. It was sufficient that they were so; and when that circumstance was afterwards disclosed, the full credit of the names of both was lent to the transaction, without any disclaimer from either. This is enough to make the firm liable, though the transaction was of a separate and particular matter. *De Berkom v. Smith and Lewis*, 1 Esp. N. P. Ca. 81. Whether there was an actual promise or not was submitted to the jury, and the fair inference they drew from the expressions of Samuel was, that he could not pay it then, not that he objected to its amount. This was therefore, clearly a promise from both the partners, obligatory on each, and the action properly brought against the defendant as survivor. In the case of *Dewer v. Macomb and others*, several partners made a joint contract for the purchase of stock. After this, and before payment or delivery a new member was taken in, and the question was, whether he should be liable on the contract previously made. The court determined he should not. There the contract was perfected before he was a member of the firm. Here the contrary is the fact. The principle that a balance long struck, without any objection being made, shall be deemed to have been assented to, ought, in the present case, to be held to apply. The account was rendered in '86, and never objected to till the time of trial.

Bogert in reply. The expressions of Samuel L. Brush contain nothing to support the action. They prove neither express promise, nor admission. They simply import that he had nothing to do with the business, and refer the whole to the return of his brother.

LIVINGSTON, J. delivered the opinion of the court. The first objection to this verdict is, that Samuel Brush, not being a partner known to Nixon at the time of forming this adventure, but admitted afterwards, the action, if

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maintainable at all, is only so against Jesse Brush, with whom alone Nixon contracted.

This objection fails, in point of fact, there being sufficient evidence of a general partnership between the [*296] Brushes *when the voyage was determined on; for shortly thereafter Jesse introduced his brother to Nixon, as his partner in business, and as concerned with him in that enterprise, to which Samuel must have assented. Now, although there be some little uncertainty about dates, we are warranted in believing that this general partnership between the brothers existed prior to the undertaking of this voyage. It becomes unnecessary, therefore, to consider how valid the objection would have been, if Samuel had not originally been interested in this speculation. Probably, as in such case, the original contract would have been between Nixon and Jesse Brush, the latter alone, on the authority of *Saville v. Robertson and Hutchinson*, 4 D. & E. 720, would have been liable for any balance claimed by the former; but on this point we give no opinion.

Another objection, and, in our judgment, a fatal one, is that this being a partnership account, the action, in this form, is not maintainable. To obviate this difficulty, it is said that here was an accounting together, and a promise by Samuel Brush to pay the balance. Were this so we should certainly not be for sending the plaintiff's to another forum, after the delay and expense which they must have incurred here, but that partners cannot, generally speaking, sue each other at common law, is a principle too well settled to be now shaken, nor is it necessary to inquire why it is, or ought to be so. Actions, however, of this kind, have lately been sustained after a balance struck and an express promise to pay. 2 D. & E. 488.

Further than this we are not willing to go, nor would some of the older cases justify our going this length. So far from an express promise to pay here, there is not even an acknowledgment of any balance being due. The ac-

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count as stated by Nixon, but not even signed by him, and made out in the absence of the other partners, from books kept by himself, is delivered to Samuel Brush, (his brother being absent from the state,) who, without objecting or admitting it to be correct, said, "he could do nothing until his brother returned from Europe." This conduct admits of but one interpretation. Samuel Brush, supposing his brother better acquainted with the affairs of this concern than himself, was determined not to commit himself. We accordingly find his language as cautious as it could well be. If being silent as to objections, and receiving the account, are to be evidences of a promise to pay, we know not how a man is to act so as to avoid *being drawn into a promise of this kind. An ac- [*297] count, and particularly a partnership one of this kind, where there was no general connexion in business, and where the books were kept by Nixon himself, might be full of errors, and yet neither of the others be able immediately to detect them. No argument, therefore, can be drawn from the silence of Samuel Brush. But it is asked, why was the account kept so long without returning it with objections? From the case, no one can say how long Samuel Brush did keep it, for he is dead, and may have died, for aught that appears, the very day after the account was delivered, and as to the present defendant, it does not appear when he returned from Europe, nor is there any evidence that he ever saw the account before this action was instituted. But keeping the account in this way can, at best, only be evidence of its being just, were the parties litigating in a court of chancery, but could not amount to that express promise to pay, without which a suit here cannot be maintained. The verdict, therefore, is palpably against evidence, and a new trial must be had with costs to abide the event of the suit. The costs are disposed of in this way because the jury were directed to find for the plaintiffs, if they were satisfied "there had been a liquidation of accounts between the parties, or an admis-

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sion of the balance due, as stated in the account rendered by Nixon." The jury should have been told "that, without evidence of an express promise to pay this balance, the defendants were not liable."

SPENCER, J. Three objections are raised to the verdict in this case: 1. That when the contract was made between Jesse Brush and Nixon, Samuel was not a partner; 2. That the evidence offered by the plaintiffs was not sufficient to justify the verdict; 3. That the Brushes were separately answerable to Nixon, as joint partners with him, and not jointly answerable, and, therefore, the remedy is at law.

The first objection is founded on the evidence in the case, that Jesse alone made the contract with Nixon. But the case states, although he did not then know of Samuel Brush, that after only seven barrels of beef had been purchased, Samuel was introduced by Jesse to Nixon, and it was then declared by Jesse that they were partners in business, and concerned together in that adventure. It also appears that when the account was rendered, it was delivered to Samuel, who made no objection as to the amount or manner of the charge. From these facts there [*298] can be no manner of doubt, that the jury were warranted in presuming the partnership between the brothers was anterior to the contract made by Jesse with Nixon. If so, it then follows, that whether he was known to Nixon or not, he would, as a dormant partner, be equally responsible. *Grace v. Smith*, 2 Black. Rep. 998. The second objection is, I think, equally untenable. The evidence having shown the Brushes to be partners, the delivery of the account to one of them, and its being retained so long, are strong testimony of an admission of its correctness. The reason assigned by Samuel was no excuse for his not examining the accounts, and objecting to them if objectionable. It has been held in chancery that an ac-

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account current, sent by one merchant to another, with a balance struck in favor of the remitter, shall, after being kept two years without objection, be considered as a stated account. *Tickel v. Short*, 2 Ves. 239. *Sherman v. Sherman* 2 Vern. 276. The rules of evidence being the same in both courts, I have therefore ground for saying, that in the present case, where the lapse of time was greater, the detention of the account so long, without expressing the least objection, was an admission of it. If it was considered as a stated account, the interest which the jury allowed was correct.

The third objection appears to me to be equally unfounded. Why, with respect to a particular share of a vessel, there may not be partners, I can see no reason. If there may be, then undoubtedly they might, in that capacity, become answerable to another person, holding a distinct share in the same vessel, as well as to any other individual. It is not stated in the case, but it has been attempted to be inferred, that Nixon and the Brushes were joint partners, and, therefore, that the only remedy is in chancery. Without discussing whether, if they were partners, a suit at law could be maintained in the present case, I proceed on the ground that they were not partners. The defendant and his brother, as owners of a part of the ship, were bound to furnish their proportion of the cargo. Instead of getting credit of a third person, not interested in the vessel, they obtain that credit from Nixon, and why, for such advances, there should not be a legal responsibility I cannot perceive. It is true, that as respects third persons, the entire owners might be answerable jointly; not, however, on the technical ground of partners, but as joint owners. The ingenious author of the *Lex Mercatoria Americana*, p. 423, very properly questions the notion that shipowners(a) are to *be considered as [*299]

(a) In *Wright v. Hunter*, 1 East, 20, the court of king's bench say, if three persons own one portion of a ship, and a fourth another, though, as between

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partners. On the whole, in my opinion, the verdict ought not to be disturbed.[1]

New trial.

GORDON, survivor of MUNRO AND GORDON, *against*
CHURCH.

If an assurer know that a policy, though in the name of the broker, is in fact effected on account of another, a set-off of a debt due from the broker cannot be made in a suit by him, on that policy, though it be carried on in his own name.

ASSUMPSIT on a policy of insurance.

The plaintiff and his deceased partner were brokers, and effected the policy in question without naming the party interested, and describing themselves as brokers only by the customary marginal insertion of their names as such. It was, however, generally known, among the underwriters, that this, and several other policies on the same risk, were on account of a charitable association in Scotland, the trustees for whom had given the orders. In March, 1802, the plaintiff and his partner made a composition with their creditors for fifteen shillings in the pound, payable by instalments, the last of which was at eighteen months, and not due when this action was commenced. The others had been paid. On the 10th of April following, the vessel not having been heard of for a year, a loss was claimed as for a missing ship, averring the interest in

creditors, they constitute one partnership, yet, as between themselves, the three make a distinct partnership; with whom the fourth may contract, and on that contract sue one or all of them, and, if all be not sued, they may plead in abatement.

[1] One partner, in a particular transaction, is not liable to the others, except on an express promise to pay. *Thomson v. Goway*, 19 Wend. 424.

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the trustees. The defendant admitted the justice of the demand, but contended he had a right to set off the amount of the last instalment. The only question was, whether he was so entitled or not.

Hopkins, for the plaintiff. The set-off, in the present case, cannot be allowed, because the plaintiff sues as a mere trustee, and the defendant's claim is on account of a debt due from the plaintiff himself. Trusts are acknowledged at law. In *Winch v. Keely*, 1 D. & E. 619, the court permitted a bankrupt to sue in his own name for a debt originally due to himself, but which he had assigned previous to the bankruptcy. The defendant pleaded the bankruptcy, but the court said he sued as trustee. So in *Bromly v. Brook*, cited 6 D. & E. 621, to debt on bond, a plea was allowed, showing that it was given in trust for money lent by a third person, who was indebted to the defendant more than the amount. So in *Wilson v. Watson*, 1 Esp. Dig. 239, or 240, the same principle was adopted. Trusts, therefore, are recognized in courts of law, to prevent, as would, otherwise be the case, the debt of A. being paid with the money of B. This doctrine we contend for has been confirmed in this court, in the case of *Johnson v. Bloodgood*. (See 1 Lex Mer. Amer. 507.) The defendant was a debtor to the plaintiff, who as- [*300] signed all his property in trust for his creditors, subsequent to which the defendant purchased an overdue promissory note, made by the plaintiff, and in an action by him, on behalf of the assignees, the court refused to permit a set-off of the note. A further objection to the claim now urged is, that the damages are unliquidated. It is settled, that whatever is to be the set-off must be ascertained and due at the time of action brought. Mont. on Set-off, 18, 19. The damages here are to be fixed only by jury intervention, and that is alone sufficient to preclude the right insisted on by the defendant.

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Pendleton, contra, was stopped by the court.

Per Curiam. No set-off can be allowed in this case. (a) The suit is on a policy which the plaintiff effected, as a mere trustee, for a charitable society in Scotland, and the case warrants us in concluding this was known to the defendant when he subscribed the policy.

Judgment for the plaintiff.

LIVINGSTON *against* LIVINGSTON.

Debts due on judgments docketed previous to the passing of the bankrupt law of the United States, remain a lien on the lands then held by the bankrupt, and have a priority in payment, out of the lands affected by them, before the general creditors, the commissioners' assignment passing such lands, subject to all judgments so docketed, if the judgment creditor has not come in under the commission.

ON *scire facias* on a judgment docketed on the 25th January, 1800.

By the 63d section of the bankrupt law of the United States, passed on the 25th of April, in the same year, it is enacted, "that nothing contained in this act shall be taken or considered to invalidate, or impair, any lien existing at the date of this act, upon the lands or chattels of any person who may have become a bankrupt." In September, 1802, a commission was issued against the defendant, on which he was declared a bankrupt, and in the November following he obtained his certificate. The plaintiff did not prove his debt, or in any manner come in under the commission.

The question was, whether the lands held by the defendant, at the time of docketing the judgment, passed by

(a) See ante, 34, *Brown v. Cuning*, n. (a.)

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the commissioners' assignment, discharged of that judgment, or whether it remained a subsisting lien paramount all claims of the creditors?

Hoffman, for the plaintiff. The English statutes have no provision similar to that in the section stated in the case. The decision in their books are under a law, similar in its regulations to the 81st section of the act of congress, by which judgments, and other debts by record, are put on a level with simple contract demands. It would be so here, did this section *stand unequal- [*301] fied, for then it would, like the English statute, have a retrospective, as well as prospective operation. But the 68d section confines the effect of the act to future judgments, and preserves the lien arising from those previously obtained.

Riggs and Harison, contra. The lien mentioned in the section relied on, contemplates only such as are created by the act of the party, as mortgages and the like, or those of factors, but not those which are induced by effect of law, and obtained *in invitum*.

Radcliff, in reply. Let the 68d section be read immediately after the 81st, and there would be no doubt of its having been designed as a proviso, or saving of the judgment, &c. contained in the 68d section. The position of the clause does not vary its construction. It must be interpreted with a regard to that part of the law to which it was intended to relate.

Per Curiam, stopping *Radcliff*. The act of congress does not affect judgments prior to the act. The 68d section of the bankrupt law was made on purpose to uphold them. It preserves all preceding liens, and there can be no doubt but that a judgment is a lien. The case of a factor would not have been affected without the 68d section. The true

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construction of the 31st section, compared and taken in connection with the 63d, is, that it is prospective, and alludes only to future judgments. It would require express words to take a party's pre-existing rights. Here the plaintiff never did any act waiving those he had under the judgment. They remain, therefore, unimpaired.

Judgment for the plaintiff.

MILLER AND GRAHAM *against* DE PEYSTER AND CHARLTON.

If an assured, after capture, appoint an agent to prosecute his claim, such agent after due abandonment becomes the agent of the assured, and a receipt by him of the money for which the property has been sold, will be deemed a receipt by the insurer, who must look to the agent for the amount, and pay the assured his full loss without any deduction. All acts by such an agent, if *bona fide*, bind the underwriter.

ASSUMPSIT on a policy of insurance on the cargo of the schooner Chance, commanded by Graham, one of the plaintiffs in the cause.

The vessel and cargo being captured by a French privateer, were sold by order of the Spanish Government at the Mantanzas, in the Island of Cuba, whither she was carried, and the proceeds of both lodged in the custom-house of that place. After this Graham appointed an agent to prosecute his claim, and departed.

The agent thus constituted, entered into a compromise with the captors, by which it was agreed that the money should be released on the captured's paying all [*302] costs and charges, and giving *up one third of the money deposited. This being done the two thirds were received by the agent, who, in answering to the interrogatories, in a commission, acknowledged having the money, and stated himself ready to exhibit the documents

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and accounts, with the balance, to any one duly empowered. The question was, whether, as two thirds of the value insured were in the hands of an agent appointed by one of the assured, they could, notwithstanding a due abandonment, recover as for a total loss?

Harrison, for the plaintiff. Had we not left an agent to manage the affairs of the vessel and cargo, there would, it is allowed, have been no doubt as to our right, but that having done so, and not having staid to prosecute, the claim is taken away. This case is exactly within the decision of *Berens v. Rucker*, 1 Black. 313. All compromises, *bona fide* made, bind the insurer. After abandonment, the agent of the insured is, like the insured himself, the agent of the underwriter:

Pendleton, contra. The question is, whether there shall be a total, or an average loss. We contend the money received by the agent of the assured is the same as if received by the assured himself, and must be deducted from the amount of the loss. This principle was settled in the court of errors, in February last.^(a) The person into whose hands the money has been paid, may have demands against the assured, and if so, he having received it under an appointment from them, will be entitled to set off the amount. We may thus pay the whole loss to the plaintiffs, and, when we ask for the proceeds from their agent, be answered with an account showing a credit to the full sum we may have paid. The plaintiffs ought not to doubt their own agent. By receiving from the underwriter one third, and giving credit for the two thirds at their disposal, complete justice is done.

Hoffman, in reply, was stopped by the court.

(a) *J. B. Church v. Bedient and others*, 1 Caines' Cases in Error, 21, but in that case the vessel was sold in her home port, and the proceeds of her in the hands of the assured himself.

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Per Curiam. The composition made by the agent, appointed by Graham, the master of the vessel, and part-owner of the cargo, was done in good faith, after a capture and abandonment. It was made for a benefit of the insurer, to whom the person intrusted with the management of the business must be considered as the agent. It was a discretion within the scope of his authority. A discretion which, if prudently exercised, would often be for the benefit of the underwriters, but which would never be used if at the hazard of turning a total into a partial loss. [*308] Had the balance, after payment *of the composition money and charges, been received by Graham himself, it might have been a proper case for deduction. But the money is still in the hands of the foreign agent. He may fail, and the assured ought not to run that risk. It is to the person in whose hands the money is that the insurer must look. Judgment must, therefore, be for the plaintiffs.(a)

Judgment for a total loss.

JACKSON, *ex dem.* VAN DENBERG, VAN VECTEN, AND
ELTING, *against* BRADT.

A tenant entering under a person claiming the whole in severalty, is not entitled to the value of his improvements from persons recovering as cotenant.

SEE this case, *ante*, p. 169. The point was, whether the defendant, in consequence of his entry in 1771, or 1772, by permission of Bernardus Bradt, was entitled to the value of his improvements, under the acts of the 16th March, 1785, and 10th of February, 1791.

(a) See *Abbott v. Broome*, 1 Caines' Rep. 303, n. (a.)

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Woodworth, (Attorney-General,) for the defendant. The construction of the acts, it may be said, is to be confined to lands held by tenants in common, whereas Bernardus Bradt was solely seised of the legal estate. Allowing this, still it is was in trust for the persons to whom he was, by the decision of the court of appeals, ordered to convey. Though the legal estate was in him, the trust was for others, and on the rule that what ought to be done is to be held as done, he must be considered as a tenant in common from the very first moment of his title. The principles of the statutes apply to equitable as well as legal estates. They were framed for the purpose of compensating the one by whose exertions many might be benefited.

Henry and Van Vechten, contra. The words of the act are against the position contended for. It was passed in favor of those who held in conjunction with others, not in opposition to them. The very circumstance of denying our right is sufficient to destroy the equity insisted on. An equity cannot arise from an adverse and wrongful holding. Had the improvements been intended to have been allowed for, the court of appeals would have saved them.

THOMPSON, J. delivered the opinion of the court. Under the facts in this case the question is, whether the defendant stands in a situation which entitles him to a compensation for his improvements under the statutes referred to? We think not. At the *time Bernardus [*304] Bradt put the defendant into possession, he did not claim to hold either an estate in joint tenancy or in common in the premises, but he claimed the whole in severalty. It was held in like manner by his children, until the year 1797, when they were compelled to convey a moiety to the lessors of the plaintiff, and those under whom they claim. The cases contemplated by the statute were those where a part owner or a proprietor who recognized the interest, or right of others with him, should make or

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authorize improvements to be made. The statutes look to a partition, and the uncertainty where the shares will fall. In such cases good faith requires indemnity for improvements, but not so where the improvements have been made in defiance of, and adversely to, the claims of every body else. To compensate the defendant for his improvements, prior to 1798, would be repugnant to the decree of the court of appeals, and to the defendants' deed given in pursuance of such decree. It is presumable that all equitable claims, which the parties to that decree might have had, were taken into consideration. The deed is absolute and unconditional, and must pass the improvements as well as the fee of the land. Besides, the plaintiffs showed title to but ten twelfths of the premises, and, therefore, come into possession only as tenants in common with the defendant, and it cannot be just that he should receive compensation for all his improvements, and still retain two twelfths of them. No rule of apportionment is appointed by the act. It contemplates only cases where the rights, or shares, in the premises, are reduced to estates in severalty, and exclusive possession claimed. The opinion of the court, therefore, is, that the defendant is not entitled to compensation for his improvements.

Application denied.

THE PEOPLE *against* BARRETT AND WARD.(a)

After a prisoner has pleaded to an indictment, the jury been sworn, and evidence offered, if the public prosecutor, without the prisoner's consent, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment; if he be it is good cause for arresting the judgment.

THE jury in this cause, which was an indictment for a

(a) See *ante*, 100.

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conspiracy, being duly sworn, the defendants were arraigned, and pleaded not guilty. Immediately after this, the district attorney served on Barrett a notice to produce a promissory note mentioned in the indictment, or that parol testimony would be given of its contents; and asked his counsel if they were ready for trial, to which they answered they were. The *note was then [*305] called for, and on its not being produced, the district attorney offered the parol evidence. To this they objected, alleging the want of due notice, as the note was not in their possession, but at a house fourteen or fifteen miles distant; and the judge, being of the same opinion, refused to permit the parol testimony to be adduced. Whereupon the district attorney moved for leave to withdraw a juror, which was granted without the consent of the defendants. On a subsequent day they were again arraigned, tried, and found guilty on the same indictment. The question was, whether these circumstances were not sufficient to arrest the judgment?

Crory, for the defendants. We have to contend for this position, that if a juror be withdrawn without the consent of a prisoner, and merely for want of sufficient evidence to convict, he cannot, after evidence offered, be put again upon his trial for the same offence. That the jury sworn and charged in a criminal case cannot be discharged (without the prisoner's consent,) till they have given a verdict, is acknowledged to be the common tradition of the law. 4 Hawk. 459, b. 2, c. 47, s. 1. This is confessed even by the few cases which, in the reign of Charles II., were decided to the contrary. Sir T. Raym. 84. But all the books are against these determinations. Lord Coke, in 1 Inst., 227, b. says, "a jury sworn and charged in case of life and member, cannot be discharged by the court, or any other, but they ought to give a verdict." This position he, in 3 Inst. 110, extends to other inferior cases. "To speak it here," he says, "once for all, if any person be indicted of

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treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned and sworn, their verdict must be heard, and they cannot be discharged. In the case of Whitebread and Fenwick, (2 State Tri. 827, 828,) the practice now contended against was adopted; but those proceedings have been reprobated, even by the crown lawyers themselves; and Mr. Justice Foster, in speaking of them, declares them to be "most unjustifiable," and such as he "hopes will never be drawn into example." Foster, 16, 80, 88. It is only a case of necessity that will warrant the withdrawing a juror. As if a man in a state of frenzy should put himself on his trial. 1 Haleⁿ, 35. Or a woman be seized with the pains of labor when under trial. *Elizabeth Meadow's case*, Foster, 76. Even in the case of Olcott, which has been thought to warrant the measure in this,

there was a species of necessity; for the jury, after [*806] a very long confinement, *declared they never should agree, and the court is not obliged to keep them together till they concur from fear of perishing with hunger. Holt, Ch. J. lays it down, that in a criminal case, not capital, a juror cannot be withdrawn unless by consent of both parties. *The King v. Perkins*, Carth. 465. The same was ruled in an indictment for barratry. *Rex v. Jeffs*, 2 Stra. 984. The offence there was punishable in the same manner as that of which the present defendants have been accused. The right claimed by the district attorney is of so dangerous a nature, that the court never will tolerate it, even under the form of a power to be exercised under the discretion of the court. It ought not to be allowed, though wished to be shielded, by arguments derived from a wish to attain the ends of public justice. It will be a source of constant resort, whenever, from any neglect or omission, a prisoner cannot be convicted on his first being brought up for trial.

THOMPSON, J. On the trial I gave no opinion as to the propriety or impropriety of withdrawing a juror. When

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leave to do it was applied for, I recommended the counsel for the prisoner to permit it, reserving, however, the question for the determination of the court, and imagined the whole to be a matter of arrangement.

Crery. I shall add only a few remarks on two citations that may be made against us. The first is the opinion of Hale, in his Pleas of the Crown, 295, 296, 297. He speaks of the practice of his time, under the reign of Charles II. The doctrines of that period have been long overruled; and it may be doubted whether he himself does not allude to circumstances of misconduct in the prisoner. "If it appear that evidence be kept back," &c., are his words. Nothing of that kind can be, or is, imputed here. The note was nearly twenty miles off. In 1 Vent. 69, *The King v. Jane D——*, the witnesses had been tampered with, and kept out of the way. These circumstances do not appear, and the authorities therefore cannot apply.

Russel, (District Attorney,) contra. I shall first submit to the court whether the informality of the notice was not waived by the declaration of the defendants that they were ready for trial? If not, I contend that in all cases the court possesses a discretionary power of withdrawing a juror, when justice requires it, even against the consent of the prisoner. The very case of doing so, if a man plead to an indictment when in a state of frenzy, is put as one of the proofs of this discretion, *and is said [*307] to rest upon it. 1 Hale, 35. The doctrine in 2 Hale, 295, is but partially stated. To withdraw a juror is there said to be "nothing more than ordinary," when it appears there may be "a fuller discovery," and this, too, "lest many notorious murders, or burglaries, should pass unpunished." The reason, therefore, that it has been anticipated, would be urged, that is, lest there should be a failure of justice, is the very one given by Lord Hale, and therefore ought to be good and sufficient now. In the

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case of bad indictments, the court always, and on the above grounds, discharges the jury. *Rea v. Segar & Potter*, Comb. 401. The authority of Sir T. Raym. 84, is acknowledged to be in point. In *Roberts' case*, Kelyng, 26, the jury were discharged by the court, merely because they saw the evidence insufficient. It may be said these were cases of faulty indictments; but in that of *Gardiner and others*, ibid. 47, the jury were discharged merely because the testimony could not be made out without the examinations taken before the lord mayor. The right to do this, when the evidence is not complete, was again recognized in *Jones and Bevor's case*, ibid. 52. Foster himself, p. 328, mentions that he should, in certain cases, use this discretionary power. It is worthy of remark, that the positions of Lord Coke, which have been relied on in 2 and 3 Inst., were examined in *Kinloch's case*, (Foster, 16,) and denied to be correct. The time for which notice is to be given to a criminal to produce a paper, is nowhere settled. It has not been determined that it ought to be a two-day notice.

THOMPSON, J. I decided nothing as to the time requisite, but merely that a notice to produce, *instantly*, an instrument near twenty miles off, was not good.

Russel. From the conduct of the prisoner, it is to be presumed the paper was there. At all events, we contend that the withdrawing a juror is matter of discretion in the court, and that they have a right to exercise it whenever they see the justice of the case requires it.

Henry, in reply. The general position is, that where a jury, in a criminal case, is once charged with a prisoner, they cannot be discharged without his consent. There are, however, some exceptions; but the rule itself was framed as a shield to the subject against the power of the crown. This principle, if correct in a monarchy, is still more so under a republican form of government. But

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under both systems, necessity qualifies the rule, and proves its existence by the very *exception [*308] it allows. One class of cases is, where the prisoner himself, by improper practices, has endeavored to elude justice. Another, where the indictment is not appropriate to the offence. A third, unavoidable accident; such as the absence of an expected witness, insanity, or any other dispensation of Providence. A fourth arises from the jury themselves; departure of one, or an invincible disagreement among the whole. 2 Hale, 295. For though unanimity in a verdict be necessary, a court will not force a jury into it for the sake of self-preservation. A fifth class, may be where the trial is so prolonged that the court and jury are tired out, and require refreshment. Within one of these descriptions of cases, every authority, in which the power has been exercised, will, on examination, be found to rank. It is, however, to be remarked, that in the edition of Kelyng, by Browne, in a note in p. 47, all the determinations cited from him are denied. Does, then, the present case fall within any of the qualifications enumerated? There is not one which presents the naked fact of withdrawing a juror, merely because a public prosecutor was not prepared. It is claimed as a right to exercise this discretion *ad libitum*. From reason, from authority, from the policy, nature, and structure of our government, it ought not to be allowed.

LIVINGSTON, J. delivered the opinion of the court. Without denying the right of courts to withdraw a juror in criminal causes, and put the defendant on his trial a second time, it is evident this power should not be lightly used, but confined as much as may be to cases of very urgent necessity, where, by the act of God, or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public, or the defendant himself. We do not mean, at present, to define all, or any of the cases in which this practice may be pursued, but we

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all agree that a defendant ought, in no case, to be put on a second trial for the same offence, where a juror has been discharged on no other ground than because the public prosecutor found himself unable to proceed for the want of sufficient testimony to convict, and where this inability was the consequence of his not taking the necessary measures to obtain it. To discharge a juror, under such circumstances, would be liable to great abuse and oppression. If the prosecutor disliked the jury, or some of them, or hoped to find the defendant less prepared at a future day, or wished, unnecessarily, to harass him, he might, [*809] at any time, attain his end if, *by solely alleging the want of proof, after a jury were sworn, he could get rid of them. It will be much better that the guilty now and then escape, in this way, than to introduce, or sanction, a practice which may place the innocent entirely in the power of a court, or a public prosecutor, which this mode of trial was intended to guard against. It will be recollected there was no improper practice here, on the part of the defendants, or any tampering with witnesses to keep them out of the way. In saying they were ready for trial the defendants told no more than the truth; but such declaration could not have obliged them to produce a paper against themselves, and which it does not appear they had with them. We are, therefore, of opinion, that the court below ought not to proceed to judgment on this conviction, but discharge the defendants.

It is proper to take notice of our opinion in this case, in August term last, and which differs from the one now given.

The question appears, at that time, to have been submitted *ex parte*, and without any intimation of the particular circumstance under which the juror was withdrawn. On the statement then made, which must have been very incorrect, we only meant to say that there were cases in which a party might be tried a second time, after a discharge of the first jury; but not that this rule was universal

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and liable to no exceptions. To dismiss a jury, merely because there be not testimony sufficient to convict, with a view to another trial, falls within the reason of none of the authorities which have been cited, and if we had known as much of this case then, as has been disclosed now, we could hardly have hesitated in pronouncing the second trial of these defendants irregular.

THOMPSON, J. The case does not state the facts which took place at the trial. It appears permission was given to withdraw a juror. An application was made for that purpose, and some arguments urged as to the propriety of the measure. I advised an acquiescence, in consequence of which I considered then, as I do now, that this should come up as a case by consent to settle the point.

Judgment arrested.

*J. M. DRUMMOND AND P. M. DRUMMOND *against* [*810]
WOOD.

If a consignment be ordered to be delivered to a particular house, if it cannot be sold at a given price, and the consignee have authority to place it with any other, in case it cannot be sold, receiving a certain specified advance, should the consignment arrive at a period when the house mentioned has become bankrupt, and the market so reduced that neither the price nor the advance specified can be obtained, the consignee will be warranted in taking an advance of a less price, if he act *bona fide*, of which remitting the sum he does receive, and the accountable receipt for the property he has delivered, according to his instructions, will be evidence.

THIS was a special action on the case, to recover from the defendant, master of the ship *Spy*, the value of seventy five pipes, four hogsheads, and twelve quarter casks of Madeira, shipped on board his vessel, for the East Indies, and consigned to his care, under a letter of instructions containing the following orders: "You are empowered to

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dispose of these wines, either at Ceylon or Calcutta, or at both places, provided that they liquidate us the cost of invoice, independent of the freight, commission, and other charges. Which, when done, you will make use of the net proceeds, and remit the same to the order of Stephen Kingston, Esq. of Philadelphia. It is to be understood that should the markets at Ceylon or Calcutta prove dull, or overstocked with our wines, and provided that they cannot be immediately disposed of, or, during the stay of your ship in India, so as to save the first cost and charges, you will in such case hand over whatever may be unsold to Messrs. George Prager & Co., of Calcutta, who will keep them for our account until the market warrants a saving and advantageous sale." The plaintiffs accompanied this letter with one to Prager & Co. communicating the contents of that to Wood, and containing the following postscript. Since writing the foregoing, it occurred to "Captain Wood, that you might not think proper to make an advance of two thirds of the value of the wines, per invoice, at the same time there might be other houses that would. In such case, he has requested us to empower him to accept of an advance of two thirds from either your good house, or such other as may wish to take charge of the wines, in case he should not be able to dispose of them during the stay of the ship at Calcutta." On her arrival there the house of Prager & Co. was found to be insolvent, and the market overstocked with Madeira wine, which had consequently fallen to a very low price. The defendant, therefore, valued himself on Messrs. Campbell & Co. who were in good credit, and received from them an advance on the shipment of about two sevenths of its value, which was the highest advance that he could obtain. This he remitted to

Mr. Kingston, taking from Campbell & Co. the [*811] following receipt: "Received, Calcutta, *9th January, 1801, from Captain Richard Wood, a consignment of, &c. which wines we promise not to sell for less than prime cost and charges, which is about 430 sica

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rupees, the proceeds of which, after deducting the advances we have made upon them, we shall hold subject to the order of Stephen Kingston, Esq. of Philadelphia." At the period when this transaction took place, Madeira wine was down to 225 sica rupees the pipe, being a little more than half the invoice price, and at the time of bringing the suit, no advice of a sale having been effected had been received.

A verdict was taken for the plaintiffs, by consent, subject to the opinion of the court whether they were entitled to recover, and submitted without argument.

THOMPSON, J. delivered the opinion of the court. We think the plaintiffs are not entitled to a recovery. The instructions to the master were, to dispose of the wine immediately if he could obtain a given sum, and to remit the proceeds to Stephen Kingston, of Philadelphia; otherwise to leave it with Prager & Co. for disposal, under the same limited orders as to price and remitting. By the postscript of the letter to Prager & Co. according to the reasonable interpretation thereof, the plaintiffs gave the master some discretionary powers. On his arrival at Calcutta, he could find no market for the wine, and the house of Prager & Co. had failed. Under these circumstances we think it would have been a gross abuse in him to have delivered the wine into the hands of those bankrupts. He, therefore, as every prudent man would have done, intrusted the cargo to the care and management of another house, of established credit, receiving considerable advances upon it. No sale could be made agreeably to the plaintiffs' instructions. The best and most advantageous disposition of it that could have been made, was that which actually was made. The proceeds of the wine, so far as they were received by the master, together with the receipt from the house in whose charge he left it, have been duly transmitted, where all the proceeds were ordered to be remitted, to Mr. Kingston. The defendant appears to have acted in

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good faith, and within the spirit and good sense of his instructions. Where no fraud is chargeable on an agent, his conduct ought to receive a liberal and favorable construction. The opinion of the court, therefore, is, that the defendant ought to have judgment.

Judgment for the defendant.

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*SEAMAN *against* PATTEN.

A government officer, sworn to faithfully act, according to the best of his ability, and perform his duty without any wilful omission, and authorized to act "according to his judgment, his opinion, and as things shall appear to him," is, in the line of his duty, a judicial officer, and not liable to an action, for want of skill, or error in judgment; *aliter*, if he proceeds *mala fide*, or from malice or other corrupt motive. Under the law for repacking and inspecting beef, an offer by a cooper to brand a cask, and a refusal by the inspector-general to have it branded, are not equivalent to a branding, he having no authority to order or refuse the branding of a cask.

ON *certiorari* to the justices' court in the city of New York.

It appeared from the return, that the action below was brought against the now plaintiff to recover from him, as inspector general of provisions, twenty-five dollars, for condemning, as unmerchable, some beef belonging to the present defendant. The record stated, that at the trial the now plaintiff moved for a nonsuit, because the barrel containing the beef had not been branded with the name of the maker, according to the directions of the act.^(a) Because, also, no malice or corruption was proved. That these reasons were disallowed, because the court were of opinion, on the first point, that an offer by the cooper, or his authorized agent, to brand the barrels, and a refusal by the inspector to permit them to be branded, were equiva-

(a) For the repacking and inspection of beef. Rev. Laws, vol. 1, p. 458, s. 16.

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lent to a branding: and on the second, because it was not necessary to prove malice or corruption, to sustain the action, the inspector-general being liable for injuries arising from want of skill.

Error having been assigned on each of these grounds, the case now came before the court.

v

Baldwin, for the plaintiff. The duties imposed on the inspector-general are specifically enumerated in the fourth section. By the 16th he is empowered to refuse the re-packing of beef, which is not brought for inspection in casks branded with the name of the cooper by whom they were made. The object of this regulation is to designate the person against whom the owner of provisions may have recourse, in case any injury arises to his beef or pork, in consequence of faulty barrels. But in no part of the statute has the inspector any control, or authority given to him over the coopers. He cannot order them to brand, and he cannot, therefore, prohibit them from doing so. His refusal, then, to permit the casks to be branded was a nullity. It did not prevent the exercise of any right, and consequently cannot give a title to any recompense. For where a right is not invaded, an injury cannot be done. In this, therefore, the error is manifest. In a case like the present, where the suit is against a public officer, the plaintiff ought to be obliged to show that the cask was such as he had a right to present to be branded. On the next point, as neither malice nor corruption were proved, it is an admission that the defendant below acted in good faith *and that if he did err it was from a [*313] mistake in judgment. If so, he cannot be personally responsible, for he is, under the inspection law, a judicial officer. The words of the statute invest him with discretionary powers. By the 4th section he may examine beef and pork in the months of June, July, August and September, "as often as he shall think proper;" and if "they appear to him" to be in danger of spoiling, he may

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remove. So a little lower in the same section, on information of any putrid beef or pork, "if, in his opinion," the removal be necessary. In the 5th section, the same language is preserved. If "in his judgment" provisions are in danger of spoiling. In the 11th section the state of the casks are left to "his opinion." He is, therefore, plainly constituted a judge of the subject matter. Supporting this action will be highly injurious to the commerce and health of the city. An inspector will scarcely ever refuse permitting a brand to be put on a barrel whatever may be its state. Policy, therefore, is against it. The spirit of the act requires an interpretation contrary to that given below. As to the beef being condemned as unmerchantable, that is a mere allegation of the now defendant. The only result of its not being branded was, it could not be exported. It might have been sold here the very next day.

Riggs, contra. The attention of the court has been called to a question by no means bearing on the merits. All the argument has been directed to the branding of the cask. The complaint is, as it appears on the record, for condemning as unmerchantable beef which was merchantable. On this point they go to trial. Had the now plaintiff not condemned the beef, but only refused to permit the branding of the casks, the evidence would not have sustained the action. His conduct, as may be collected from the record, is this. I will not inspect because there is no brand, and I will not permit a brand that I may inspect; but, for want of a brand, I will condemn as unmerchantable. The parts of the act cited, do give the inspector-general a discretionary power in certain cases, but not in one like the present. The question for the court to decide is this; whether when a law gives power to do certain things, and the legislature does not provide a remedy for mistakes in others, an officer shall not be answerable to a person, who is injured by his want of skill? He ought to take pains to form a right judgment. In all cases of this kind, where

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inferior jurisdictions are created, unless the officer *is protected in the exercise of his judgment, he is [*314 responsible. This position of law is universal. In *Jones and Percival*, (cited *ante*, 108. See the case since reported, 2 Johns. Cas. 49,) the justice was made to pay for issuing a warrant instead of a summons, though done at the request of the plaintiff. The law imposed on him to know, at his peril, whether the defendant was to be thus proceeded against or not. So in cases of commissioners of bankrupt, if they wrongfully declare a man a bankrupt, they are liable, as trespassers, for all that is done under the commission. The same rule applies to custom-house officers. *Leglise v. Champante*, 2 Stra. 820. In this last case no fraud or corruption was even insinuated. The principle is recognized also in *Warne v. Varley and others*, 6 D. & E. 443, where the searchers, authorized to seize all leather not sufficiently dried, were held responsible for seizing such as was sufficiently dried, though by the statute empowered to seize such as in their judgment was not so. In this last cited case, Lord Kenyon says, legislative provision is necessary to exempt them from this common law responsibility.

Baldwin, in reply. This case from *Strange* is of a ministerial officer. So is that from *Dunford and East*, for the judicial characters were the triers, before whom, after the seizure, the leather is, by the statute, directed to be carried, to ascertain whether its quality is according to the act. This very remark is made in the case relied on against us, by Lawrence, J. p. 450. *Gwinne v. Poole*, Lutw. 290,(a) is in point against the action.

LIVINGSTON, J. delivered the opinion of the court. In our opinion the judgment rendered on this verdict is erroneous, and must be reversed.

Without denying the general principle (which is too

(a) Trespass against a judge, officer, and plaintiff, in an inferior court.

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well settled to admit of controversy) that unless the legislature provide for the protection of officers of this description, they act at their peril, although their conduct be *bona fide*, and according to the best of their judgment, there are, in this case, sufficient marks of distinction to justify our not adding it to the revolting precedents which are already to be found on this subject. In making use of this term, I do but little more than follow the example of most judges who have been called on to enforce a rule which they admit to be a hard one, and against the operation of which, modern legislators, unless from oversight, generally take care to guard. The whole court, in the case of *Warne v. Varley*, seem solicitous to discover some ground on which the defendant, who had acted fairly and *bona fide*, might

[*815] escape. This liability *was first enforced against officers who acted as volunteers, and generally received a portion of the spoil. These were collectors and excise officers, who were neither bound by oath, nor enjoined by law, to make seizures, but might do so or not, as they pleased. Thus in *Imlay v. Sands*, 1 Caines' Rep. 566, decided in February term, 1804, the defendant, who was collector of the port of New-York, in seizing a vessel, with a very valuable cargo, was under no legal injunction to do so, and would have been entitled to a very considerable share of the proceeds arising from confiscation. In such case there is no rigor in letting an officer act at his peril, and in putting his justification on the event. But when persons in a public capacity act upon oath, in matters too which require skill and experience, and in which men may honestly differ in opinion, it seems cruel not to protect them when they conduct themselves with integrity, and without abusing their authority; or manifesting any symptoms of malice. But this alone, if the case of *Warne v. Varley* be a precedent, affords no justification. Some other excuse, then, must be found for the plaintiff, or he cannot escape. Let us, then, see whether, in the terms of the law, an ample justification will not be found, and such a one as the court of king's

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bench seemed willing to admit in the case just mentioned. The defendant there pleaded that he had seized the leather because, "in his judgment, the same was not well dried." But the act of parliament had not given him authority to seize, what, in his judgment, was not sufficiently dried, but only generally to seize leather of that description, without referring to his judgment at all. If it had, Lord Kenyon would not have held him liable. "It seems reasonable," says he, "that if these searchers exercise their authority *bona fide*, and only seize such leather as in their judgment ought to be examined, they should be protected, but the act of parliament affords them no such protection." From this mode of expression, as well as from the reason of the thing, it is clear, that were the judgment or opinion of the officer expressly referred to by law, as the rule of his conduct, he cannot, and ought not, to be answerable for an upright use of it, but is as much protected by a clause of this kind as by those which are usually introduced for this purpose. This reference will be found throughout the law under which Seaman acted, and must have been made to prevent his being harassed by demands of this nature. Every thing almost which, as inspector-general, *he is to do, is to depend on his judgment or [*316] opinion. He swears "he will faithfully and impartially, according to the best of his ability, perform his duty, without any wilful omission, neglect, or delay whatever." It is not a little extraordinary, that when the legislature exact no more of a man than an exertion of his best abilities, he should still be responsible, merely because another may have more ability or capacity than himself?

The fourth section authorizes him to remove without the city all such beef and pork as shall appear to him to be in danger of spoiling, &c. Will it be said that he would also be liable, if he should *bona fide* order any of these articles to be removed, if it turned out that they were in no danger of spoiling? Shall it be his duty to remove these articles; shall he swear that he will perform his duty; nay,

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shall he be liable to a heavy penalty for neglect, and shall his own opinion be made the only criterion of the necessity or propriety, and shall he not dare to exercise it? So, again, in the same section, he is to order beef or pork, in a putrid state, to be removed, if in his opinion the removal be necessary. Surely it would be a satisfactory defence to an action, on this part of the statute, to say that the removal in his opinion was necessary. Why vest such power in him, as a security for the health of the city, if he be not to use it? If too latitudinarian, the legislature, and not he, is to blame. Again, by the first section he may remove certain provisions, if in his judgment it be proper. The eleventh section, in like manner, (and this applies more immediately to the present action,) declares that the barrels, in which beef shall be repacked, (which must, of course, be judged of before they can be inspected,) shall, in the opinion of the inspector-general, be every way strong, and tight enough to prevent the pickle from leaking out. Now, if this be an action for not inspecting the beef, and it can be no other, notwithstanding the inaccuracy of the return, calling it an action for condemning the property, which the inspector could not do, who can say that the plaintiff was of opinion that the barrel was as tight and strong as it ought to be? If he were not, it was his duty, however incorrect the opinion may have been, to refuse its inspection; for it must be an incontrovertible position, that when by law it is made the duty of a public agent, however high or low his station, to do a thing, if in his opinion certain requisites are complied with, he can never be liable for omitting to act, (which it is attempted to make him here,) without proving corruption, malice, or some misbehavior. It does not appear why the beef was refused. It may have been for the very cause just mentioned, which would be a complete defence. But if the inspector proceeded on the ground, as it would seem he did, of the barrel's not being branded with the name of the person who made it, he was also justifiable. The sixteenth section is

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explicit on this point, and it is admitted no such brand appeared. An offer to brand was not sufficient. It is idle to say that the inspector-general refused to let it be done. He had no control over the cooper, or the cask. The defendant might have taken it away, and returned it properly branded. On this point the justices were also mistaken. The party, to entitle his beef to inspection, should have taken care to have put it in the state required by law. Until that was done, the inspector had nothing to do with it, or with his offers. But if the cask had been properly branded, the inspector had a right, by law, if he thought proper for other reasons, to refuse its inspection, and this is the ground on which we proceed. There is yet another distinction between this action and those which are generally brought against public officers. The latter are almost always actions for some tort, such as seizing the plaintiff's property, or breaking into his house, or the like; whereas this is an attempt to charge him, not for a sin of commission, but for one of omission. It may well be doubted whether this alone would not justify our deciding it on principles different from those which have heretofore governed, in the cases referred to. But without pursuing this inquiry, our opinion is, that an officer, acting under a commission from government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites therein mentioned have been complied with; and inhibited, under the like exercise of his own discretion, from doing other things; who is sworn to discharge these duties to the best of his ability, and exposed also to penalties, as well for negligence as for acting where he ought not, is not answerable to a party, who may conceive himself aggrieved for an omission arising from mistake or mere want of skill, if there be no bad faith, corruption, malice, or some misbehavior, or abuse of power. Nothing of the kind appearing here, the judgment must be reversed.

Judgment of reversal.

In the matter of Fitzgerald.

[*818] *In the matter of FITZGERALD, an absent debtor.

A person who has been merely transiently within the state cannot be proceeded against, as an absconding or concealed debtor, and to authorize proceedings against him as an absent debtor, the creditor who adopts them must be a resident within the state. If a debtor do not actually reside within this state, though he lead so roving a life as to render it very difficult to fix on his domicile, his being transiently here will not make him a resident within the meaning of the act affording relief against absconding debtors.

THIS was an application to supersede an attachment issued against the property of Fitzgerald, as an absconding or concealed debtor.

The principles on which it was urged are so fully detailed in the opinion of the court, that it is not necessary to do more than state the judgment of the court, which was delivered by

LIVINGSTON, J. We are asked for this supersedeas on two grounds:

First. Because Fitzgerald, being a non-resident, was not liable, although transiently within the state at the time, to have his property attached as an *absconding or concealed debtor*, but ought to have been proceeded against as an *absent debtor*.

Secondly. Because the creditor, who obtained the attachment, being also resident abroad, had no right to this remedy against Fitzgerald, if the latter be regarded as an absent debtor. We think both these objections are well taken.

The act throughout contemplates two classes of debtors, those who reside within, and those who are absent from, the state. Against the first the proceedings are more summary, as they ought to be, and trustees are appointed in three months, while no such appointment, as it respects the latter, can take place in less than a year.

The oaths, on which the attachments are obtained, also

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differ. Against an absconding debtor the party swears, among other things, that his debtor has *departed* the state, with intent to defraud his creditors of their just dues. Now this allegation could hardly be made with respect to a person residing abroad, and who had left the state with a view of returning to his family.

The notice also given to the absconding debtor contemplates his being a resident. He is directed to *return* and pay his debts. This would be a singular request to make of a man who resided permanently abroad.

One of the ways, too, in which the attachment against an absconding debtor is to be superseded, shows that he must be a resident. For part of the condition of the bond, which is required of him, by the seventh section of the law is, that he shall prove himself a *resident within this state*. This can hardly mean a residence of a temporary nature, but one permanent and fixed.

*Independently of these distinctions, which are [*319] to be found in the act itself, it would be rigorous and unjust to expose the property of an *absent* debtor to so serious a process, merely because he may have concealed himself for a few days, to avoid being arrested when in a foreign country, where, from his situation, it must be extremely difficult to obtain bail. There is certainly more impropriety in a resident debtor shutting himself up to avoid his creditors, and the ordinary process of law, than there would be in a stranger's pursuing the same course.

We also think that an absent creditor, such as Galway is, cannot proceed, by an attachment, against the estate of his *absent* debtor. The 23d section confines this remedy to the estates of debtors, who reside out of the state, and are indebted *within it*. By this mode of expression, we understand that the debt must be due to a person residing within the state, and not a stranger who may be here transiently. It is very well to give our own citizens a remedy over the property of their absent debtors, but it would be harsh and impolitic to extend this remedy to

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strangers, who might pursue the property here, for the sole purpose of seizing it, and by this means drive its owners to a settlement on very unequal terms, or compel him to litigate in a distant forum, when perhaps both the parties, residing near each other, ought possibly to be left to apply to the tribunals of their own country. For these reasons the attachment must be superseded.

There is some controversy as to the place of Fitzgerald's residence. It appears that he is a subject of Great Britain, and that he has been latterly trading in several of the West India islands, and has never been in this country until a short time before the attachment. He came here on a commercial adventure, without any idea of settling among us, or of not returning as soon as his business was settled. This is enough to satisfy us he is a *non-resident*. If he led so roving a life abroad as to render it difficult to fix on his domicile, it will not make him a resident of this state. He still remains an absent debtor, the *animus revertendi* having never been laid aside.

KENT, Ch. J. and SPENCER, J. gave no opinion, not having heard the argument.

Supersedeas awarded.

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*MUNRO *against* ALAIRE.

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1. If a submission be "so that the award be made in writing, ready to be delivered," it need not be stated *in totidem verbis*, if circumstances from whence it must necessarily be inferred that it was in writing, be averred. Therefore, alleging it to have been in "form following," when it contains a reference to its date, and stating in an averment "after the date thereof," and a rejoinder specifying a fact "before the date of the award," are sufficient circumstances to show the award was in writing, and the imperfection, if any, in stating the award, is cured by the rejoinder.
2. An allegation that an award was made, necessarily implies it was ready to be delivered.
3. Though an award mention a thing by a different name than that by which it is described in the submission, it is not on that account an award on a matter out of the submission, if it appear, by the award, that it is the same thing mentioned in the submission, and, in such case, if the breach be assigned, on that very thing, by the name given to it in the award, it need not be averred that the thing mentioned in the award, and that described in the submission, are one and the same thing.
4. A submission may be of matters concerning the realty.
5. Divers other matters in a submission extend to real as well as personal concerns.
6. An award directing an exchange of lands is good.
7. A submission of "divers other matters" is equivalent to a general submission of all questions and controversies between the parties, and, under it, general releases may be awarded.
8. If a special matter be submitted, and a general release awarded, it enures only to the matter submitted.
9. An award, to be mutual, need not be equal.
10. It is no objection to an award ordering general releases that one party is directed to perform his part before the other releases, especially when the party, to whom the general release is ordered to be first given, is directed to do certain acts not dependent on the releases.
11. On a penal bond within the statute for the amendment of the law, the plaintiff must assign all the breaches he means to go for, the act being compulsory, and may assign them either in the declaration, or when he replies, and in assigning his several breaches he need not say "and for further breach according to the statute," *ut sem.*; but if necessary, advantage of the omission can be taken only on special demurrer.
12. After a plea of no award, a rejoinder confessing and avoiding the award is a departure.
13. A recital in a deed, anterior to a submission to arbitration, cannot be pleaded as an estoppel to a subsequent award.

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14. On a *venire tam quam*, the plaintiff has it in his election to assess contingent damages on the trial in fact, before arguing the demurrer, or argue the demurrer first and assess his damages afterwards.

ON demurrer.

The plaintiff declared in debt on a bond, the condition of which, as set out on the *oyer*, stated "that sundry controversies subsisted between the plaintiff and the defendant, and Callicia Alaire, touching the division fences between their farms, at Mamaroneck, and sundry roads and paths claimed by each party, and divers other matters and that being desirous of terminating the said controversies equitably, they had submitted to the award of Jonathan Ward and Samuel Youngs, as arbitrators, touching the premises, so that it be made, in writing, ready to be delivered on or before the 15th day of October instant."

To this the defendant pleaded, 1. *Non est factum*; and, 2. *Nul agard*. On the first, issue was joined, and a *venire facias tam quam* sued out, on which the jury found for the plaintiff on the first plea, and assessed contingent damages, to the amount of 600 dollars for the breaches subsequently mentioned. Upon which point a short case was annexed to the demurrer book.

To the second plea the plaintiff replied, setting forth an award directing, 1. All suits between the parties to cease, and be no further prosecuted, and that each should pay his own costs; 2. That the defendant and Callicia should, on or before the 1st day of November then next, convey unto the plaintiff, *in fee*, a certain piece of salt meadow, in Mamaroneck, commonly called Peter Alaire's road to his Salt Meadow, and deliver the deed, on or before the said 1st day of November; 3. That the plaintiff should, on or before that day, convey, *in fee*, to defendant and Callicia, a certain piece of salt meadow and upland, situate at Mamaroneck, being two rods wide, (describing it by metes and bounds,) reserving to himself and his heirs, at all times, a right to pass and repass, across and upon, the salt meadow

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and upland, and every part thereof, with horses, cattle, &c. and should deliver the deed for the same on or before the said first day of November, paying at the same time to them, or one of them, the sum of twenty dollars; 4. That the plaintiff should, on or before the 15th of April then next, erect, and for ever keep up, a sufficient fence, therein described; 5. That the defendant and Callicia should, on or before said 15th day of April, erect, and for ever *keep up, a sufficient fence specified in the [*321] award, and that the parties should, within twenty-two days thereafter, mutually exchange, by deed, two pieces of ground, of one and two square rods, divided by the said fences, the said plaintiff reserving a right and privilege to pond and drown the sedges growing on part of the land so to be exchanged; 6. That the plaintiff was seized in fee of, and should hold, a certain road by, through, and upon the farm, formerly of the defendant, and now of the plaintiff, as therein described, for the exclusive benefit of the plaintiff and the defendant and Callicia, to be open at the end adjoining the turnpike; 7. That the plaintiff should have full right to repair the said road, and to keep it in repair in such manner as should be most expedient, and that the defendant should not interfere therein, and that all swing gates erected thereon should not swing into the road but into the lots; 8. That the water fence should be maintained by them jointly, and that the parties respectively should maintain certain division fences; 9. That the defendant and Callicia should, on or before the 1st of November aforesaid, execute a general release of all demands, &c. to the date of the submission, and that, so soon as the defendant and Callicia had complied with the award, the plaintiff should execute alike release. The plaintiff then averred that, on his part, all actions had ceased, that he had offered to execute the deed, and pay the twenty dollars directed, and to exchange, and was still ready so to do, &c. and after protesting that the defendant had not, in any thing, kept the award, assigned as breaches the not

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granting the deed for the salt meadow, and the not executing the release of all demands. The defendant rejoined that the plaintiff ought not to be permitted to say that the defendant did not convey, &c. nor release, because, by a certain deed of the 16th May, 1801, reciting that each party was respectively seised of certain land therein mentioned, and was thereto appertaining, respecting which there were controversies, for putting an end to which the plaintiff granted to the defendant a certain way, and that the defendant was thereof seised in fee; and then averred that the piece of salt meadow, called Peter Alaire's road to his Salt Meadow, and described in the breach first assigned, is one of the ways in the said deed, in which the plaintiff and defendant are therein alleged to be respectively seised.

General demurrer, *inde*, and joinder.

Emott, in support of the demurrer. The rejoinder [*322] der is *clearly a departure. The questions, therefore, will be on the replication. It is necessary, therefore, to consider whether the award be void, and if not, whether the replication is good. It is immaterial to discuss the validity of the award in all its provisions; if it be so in some it is sufficient, provided we can show certainty and mutuality, though it may be bad in others. *Fox v. Smith*, 2 Wils. 267; *Addison v. Gray*, *ibid.* 293. Releases and conveyances were ordered in these cases, and no objection taken. The award, then, is good in those parts, and as it is on them that we have assigned the breaches, we are entitled to judgment, though the arbitrators may have gone beyond their authority in ordering the road. If the breaches be well laid, still it may be made a question whether double breaches can be well assigned. This will turn upon whether arbitration bonds are within the statute. Whatever may have been the ancient determination on this point, modern decisions allow of double assignments. *Fox v. Smith*, 2 Wils. 267. If this be allowable in Westminster-Hall, it is certainly so here. The English statute is, (8 &

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9 W. III. c. 11,) "that in all actions, upon any bond, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, &c. the plaintiff may assign as many breaches as he shall think fit." Our law is greatly broader. It says (1 Rev. Laws, 349,) that "in all actions, upon any bond, other than for the payment of money, the plaintiff may do the same." It gives the right wherever the bond is not for the payment of money alone. But if this be not so, and the replication be faulty on that account, the defendant ought to have shown it as a cause of special demurrer. The awarding of general releases may be relied on as proving that the arbitrators exceeded their authority. The submission is not only with respect to the road and fences, but of "divers other matters." Allowing, however, that it is so, the other side ought to have made it appear. The award is "of and upon the premises," and in such cases it is laid down to be a *stated rule*, that if the words used in them be, in their nature, more comprehensive than the submission, yet it shall be intended that there was no other matter between the parties to lay hold on than that which was submitted, if the contrary be not shown. *Knight v. Burton*, 6 Mod. 232; *Arnote v. Bream*, *ibid.* 244; *Bell v. Gipps*, 2 Ld. Raym, 1141; *Hooper v. Pierce*, 12 Mod. 116; *Lee v. Elkins*, *ibid.* 585; *Banfill v. Lee & Jeffray*, 8 D. & E. 571. The doctrine *is fully stated in *Hill* [*323] *v. Thorn*, 2 Mod. 309. "If there be a submission of a particular difference, and there are other things in controversy, if in such a case a general release is awarded, it is ill; and it must be shown on the other side, to avoid the award for that cause." It may be argued against us that the award does not appear to have been in writing. But wherever circumstances are so set out as to show a particular fact must have necessarily taken place, it is not necessary to state that fact in express terms. Therefore, if an award be made, the plaintiff need not state it was ready to be delivered. *Reusby v. Manning*, Carth. 159. Here the award is said to have been "in manner and form following,"

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and the plaintiff alleges that he did, "after the date of the award, and before the time limited therein," &c. If it had a date, and contained a limited time, it must have been in writing, and being but matter of circumstance, is cured by the defendant's confessing and avoiding the award in his rejoinder. *Aylet v. Williams*, 3 Lev. 193; *Mallet v. Mallet*, Cro. Eliz. 708; Com. Dig. tit. Pleader, C. 85, E. 37. The defendant "says" on or before the first "day of November, ensuing the date of the said award," and goes on to set forth what he relies on as an estoppel. From the case accompanying the demurrer book, it appears that the defendant denies our right to sue out the *venire tam quam*, and insists we should first have argued the demurrer. But whenever the plaintiff is placed, by the defendant, in such a situation as to have an issue in law, and an issue in fact, depending at one and the same time, he may at his election try either the one or the other first. *Cooke v. Sayer*, 2 Burr. 753; *Dubberly v. Page*, 2 D. & E. 394. It may perhaps be more advisable to argue the demurrer first, but on that the plaintiff has a right to determine. In 5 Wentw. Pl. 17, 86, there is a precedent fully in point.

Woods and Benson, contra. Though the objection as to the award not being stated to be in writing, may be more a formal than a substantial objection, still it is a good one. *Jenkinson v. Allenson*, 3 Keb. 556; *Henderson v. Williamson*, 1 Stra. 116; *Sallows v. Girling*, Cro. Jac. 277. Com. Dig. tit. Arbitrament. The mere reading of the submission shows that the arbitrators have exceeded their authority. Controversies respecting roads and fences were the only matters submitted. They, however, proceed to award general releases. It is attempted to justify this by the words "divers other matters;" but the generality of these terms must be restrained to the things specified in the [*324] submission. They refer to the *matters in dispute, and are thus expounded in all other cases, upon principles of legal construction. 2 Rol. Abr. 409,

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pl. 8. *Digger's case*, 1 And. 64. *Cole v. Knight*, 8 Mod. 277. So, general releases, on a special submission, are construed to relate only to the matter in arbitration. *Pickering v. Watson*, 2 Black. Rep. 1117. There was no right to determine anything respecting the meadow, and it is not averred that the meadow was a road. Wherever an award varies from the submission, in describing the subject of the arbitration, it is bad, unless it be described by two names, and then it must aver they are one and the same. *Withers v. Drew*, Cro. Eliz. 676, the submission was about an enclosure between Barton Down and North Down, the arbitrament was of an enclosure betwixt the defendant's down and the down of J. S. and there was no averment that they were all one. In consequence of which, as the breach was alleged in that point, it was held the plaintiff could not have judgment. The assignment, therefore, of the plaintiff, is on a vitious part of the award, and not to be supported on his own doctrine. *Fox v. Smith*, 2 Wils. 267; *System of Pleading*, 105. It may be questioned how far even an averment would have cured the fault. Where an award is on the face of it beyond the submission, an averment will not help. *Bacon v. Dubarry*, 1 Ld. Raym. 246. It is impossible the salt meadow could have been in dispute. The rejoinder shows it was before settled, and the demurrer admits it. There is also a want of mutuality. The releases of the meadows are ordered, on the one side with a reservation of a right of way, and on the other to be made absolutely. If the award should be good, still the assignments are bad. After one breach set forth, the record should have stated "and for further breach according to the statute," &c. *Hardy v. Bern*, cited in *Roles v. Rosewell*, 5 D. & E. 541. This is necessary, because the statute (1 Rev. Laws, 349) is compulsory, and the plaintiff cannot elect to proceed at common law. The indenture in the rejoinder is well pleaded, and the recital alone an estoppel. *Shelly v. Wright*, Willes, 18. The action ought to have been covenant, if damages for the breaches were to

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have been recovered. The declaration is in debt on the bond, and ought to have been for the penalty. The assignment of breaches in the replication is incongruous to the nature of the suit brought. It is clear the trial for the assessment of damages ought not to take place till after judgment on the demurrer, because, if it be determined that the award is bad, no damages can have accrued.

[*325] **Harison*, in reply. This mode of declaring on the bond, and assigning breaches in the replication has been uniformly pursued. *Goodwin v. Crowle*, Cowp. 357; *Roles v. Rosewell*, 5 D. & E. 538; *Drage v. Brand*, 2 Wils. 377. It is not necessary to the mutuality of an award that it should be equivalent in value. Justice may require that one party should receive more than the other. Independent of the authorities cited in support of the present form of action and replication, the spirit of the act, (1 Rev. Laws, 346,) "for the amendment of the law, and the better advancement of justice," require that such should be the mode of proceeding. The statute was framed to prevent the necessity of driving a defendant into equity, where judgment had passed against him for a penalty of a bond, when only a trifling damage had been sustained by the breach of it. It may, perhaps, therefore, be said, the statute is compulsory, and this the only legal method that could have been adopted. If so, the trying the issue before arguing the demurrer, was a matter of election in the plaintiff. Should the cause go against him he pays costs. If otherwise, he gains time, by having the assessment ready made, in case the determination of the court should be in his favor.

KENT, Ch. J. delivered the opinion of the court. Upon the record now before the court, the material questions that are raised respect the replication. The counsel for the defendant contend it is bad; 1. Because there was no averment that the award was in writing, or ready to be deliv-

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ered; 2. Because the award set forth orders matters to be done that were not in the submission; 3. Because the award is not mutual, as the plaintiff's deed was to contain a reservation, and as his general release was not to be made till the defendant had performed the award on his part; 4. Because the assignment of breaches was void, inasmuch as part of the matter assigned was void; and that only one breach ought to have been assigned, and that should have been in the declaration. The first objection is without foundation. The award is stated to be "in the form following," and in the body of it, as set forth, there is a reference to the date of it. It must, therefore, be intended to be in writing, as the circumstances which are averred necessarily imply it; and it appears from the case of *Reusby v. Manning*, Carth. 159, 3 Mod. 333, that an award may be so intended, although the fact be not specially stated. It may further be added, that the replication is, in this respect, agreeable to an approved precedent in 3 Ld. Raym. 106. But if *this omission was [*326] to be deemed an imperfection in pleading, it would be cured by the defendant's rejoining over, and thereby admitting an award in form. Com. Dig. tit. Pleader, C. 85. Nor was it requisite to aver that the award was ready to be delivered. This is also intended, and is implied in the allegation that it is made. If the fact were otherwise, it would be incumbent on the defendant to show specially that the award was not ready.(a) *Bradsey v. Clyston*, Cro. Car. 541; Carth. *ubi sup.* *Marks v. Marriot*, 1 Ld. Raym. 114.

The next question is of more importance, and relates to the merits of the defence. The submission was of sundry controversies, touching the division fences between the

(a) Or it appear by the replication to the plea of *nil agard*. As where the plaintiff in his reply stated that the award was ready to be delivered to him. *Pratt v. Hackett*, 6 Johns. Rep. 14. To constitute it an award, it must be signed by all the arbitrators, though they act under a parol submission. *Green v. Miller*, ib. 39.

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farms of the parties, and touching sundry roads and paths, claimed by each, and touching sundry other matters. The award, among other things, orders the defendant to convey to the plaintiff a certain piece of salt meadow; but it is described as known by the name of Peter Alaire's road, and that it runs through the land and meadow of the plaintiff, and contains sixty-six square rods. It is apparent, then, that the meadow here mentioned must be one of the roads, or paths, referred to in the bonds of submission, as it has the name and quality of a road or path; and although the release of it concerns the realty, and transfer land, yet that was the very matter submitted. A controversy concerning a road or path, may perhaps, in strict technical language, relate only to an incorporeal hereditament, or right of way, but in common parlance it will equally refer to a claim to the soil. In arbitration bonds, which are to be liberally expounded, and, as in the present case, refer to divers other matters not named, it would be considering the words too curiously to confine them to the first construction. The parties were also, by the award, to exchange with each other, small strips of land of one and two rods square. These strips must be viewed as connected with the subject of the division fences, and to have been part of that controversy, as the award states that they arose on the settlement of the division fence. We do not perceive anything in the award that may not be included, even in the subject matters of the controversy *specially* submitted, except it be that part of the award which directs general releases. But the submission is "*touching divers other matters,*" as well as those particularly mentioned. The words used are operative and equivalent to a general submission of all questions and controversies between the parties. They are used as forming an independent

[*327] *part of the submission, and it is impossible not to perceive that the parties intended by them, to embrace different and more general matter than that which had already been specified. Questions concerning real

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property may be submitted without being specifically named. A submission of *all demands* includes questions concerning real as well as personal property. *Marks v. Marriot*, 1 Ld. Raym. 114. The law does not now require a specific submission as to one kind of property more than as to the other. The rule, in an analogous case, in the construction of deeds, is, that if a general clause be followed by special words which accord with the general clause, the deed shall be construed according to the special matter; but that if a deed contain special words, and conclude with general words, the general as well as the special words shall stand, for *generalis clausula non porrigitur ad ea, quae antea specialiter sunt comprehensa*. *Edward Altham's Case*, 8 Rep. 154, b. But if the submission was not to be construed beyond the special matter, yet the release, though general in terms, would be held to enure only to the matter submitted, and as no other differences between the parties have been shown, no other are to be intended. *Simon v. Gavil*, 1 Salk. 74. *Hill v. Thorn*, 2 Mod. 309. *Pickering v. Watson*, 2 Bl. Rep. 1117. *Keen v. Goodwin*, Bunb. 250. *Stephens v. Mathews*, cited Ld. Raym. 116. So that even, in this view of the question, the award is good.(a)

Another objection to the award is, that it wants mutuality. It is not requisite that the same acts, in the same unqualified manner, should be awarded on each side to render the award mutual.(b) The reservation, in the plaintiff's deed to the defendant, might have been the ground of one of the questions, controverted, and it may have been proved to the satisfaction of the arbitrators, (and so we are to intend,) that the plaintiff had a valid claim to the right of way so reserved. If an award puts a final end to the

(a) An award by an umpire, stating that he took upon himself the burden of the umpirage, implies that he awarded on the matters submitted. *McKinstry v. Solomons*, 2 Johns. Rep. 57.

(b) An award that the one party shall pay a certain sum to the other, is mutual and final, without mentioning a release. *McKinstry v. Solomons*, 2 Johns. Rep. 57.

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controversy, and awards mutual releases, there is no ground for the objection that it is not mutual. *Bacon v. Dubarry*, 1 Ld. Raym. 246, the second point. Kyd on Awards, 148, 149. The objection that the defendant is first to perform and execute on his part, before the plaintiff is to execute the general release, was also raised in the case of *Marks v. Marriot*, and there overruled because the defendant's release would not be construed to deprive him of his remedy on the bond, if the plaintiff should refuse to perform on his part, and because other matter, as is the case here, was awarded to be done by the [*328] plaintiff, without being dependent on the *releases.

None of the objections to the award appear, therefore, to be valid.

The last point made by the defendant is on the assignment of the breaches. It was urged that the plaintiff could not regularly assign breaches in the replication when the declaration was in debt for the penalty, and that if the plaintiff intended to go for damages, he ought to have brought his suit in covenant. We apprehend, however, that the practice is too well settled to be now shaken by this objection. The plaintiff may, perhaps, pursue either mode at his election. He may declare in debt for the penalty, and assign breaches at the same time in his declaration, as was done in the cases of *Goodwin v. Crowle*, Cowp 357. *Drage v. Brand*, 2 Wils. 378, and *Roles v. Rosewell*, 5 D. & E. 538, or he may declare simply in debt for the penalty, and leave the assignment of the breaches till the replication, where he must assign them, if the nature of the plea demand it. This course was pursued in the cases of *The African Company v. Mason*, 10 Mod. 227. *Cornwallis v. Savery*, 2 Burr. 772. *Cooke v. Colcraft*, 3 Wils. 380. *Shum and others v. Farrington*, 1 Bos. & Pull. 640, and *Strange and others v. Lee*, 3 East, 484. It is to be observed that all these last cases are upon bonds with conditions for the performance of covenants, and the former cases arise upon articles of agreement with a penalty. In the case of bonds

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therefore, it seems to be the uniform course to declare simply for the penalty, taking no notice of the condition, and to leave the assignment of breaches to arise afterwards, in consequence of the plea. Lord Coke, (10 Rep. 94, a.) cites an instance as early as Ed. IV. of this mode of declaring, and assigning a breach on an obligation with a condition. But it is further objected, that the plaintiff, as he declared in debt for the penalty, ought to have assigned only a single breach. This was the common law rule, because a single breach worked a forfeiture of the penalty, and the assigning of two breaches was considered as rendering the plea double. Cro. Car. 176; 1 Roll. Rep. 112, and the cases of *The African Company v. Mason*, 10 Mod. 227, and *Cornwallis v. Savery*, 2 Bur. 772, since the act of W. III. seem to have admitted the same rule. But subsequent cases have adopted a different practice under the act of W. III. and allow of the assignment of double breaches, even in cases where the plaintiff declares in debt for the penalty. This was done in *Goodwin v. Crowle*, and *Drage v. Brand*, and also in *Hardy v. *Bern*, cited [*329] in 5 D & E. 540, (which were suits for the penalty, in articles of agreement,) and also in the case of *Strange and others v. Lee*, which was upon a bond for the performance of covenants. The assignment of double breaches was held, in these cases, to be an election of the plaintiff to proceed under the statute, although he had not named the statute in express words, and which omission is, at any rate, but mere form, and bad only on special demurrer, though we incline to think it altogether unnecessary to have any express reference to the act. It was also held to be compulsory on the plaintiff to proceed under the statute in cases within the provisions of it, and that he must assign the breach of such covenants as he proceeds to receive satisfaction for. Our act is more comprehensive than the English. It reaches to every case of bonds, with any condition other than for the payment of money, and it is in every such case compulsory on the plaintiff to assign

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breaches, and to have his damages assessed. Any other construction would defeat, in a degree, the equitable provisions of the statute, and force the defendant into equity for relief.

The rejoinder is manifestly bad. It is no answer at all to one of the breaches assigned, viz. the non-execution of the general release, and as to the other matter set forth, it is a departure from the plea.^(a) The estoppel which is relied on, as arising from the recital in a deed executed by the plaintiff, long anterior to the bond of submission, cannot apply. The submission to arbitration, and the award, have put an end to questions and pretensions which before existed, relative to the matters submitted, and the rights of the parties must now be ascertained by the award itself. We are of opinion, therefore, that upon the demurrer in this cause the plaintiff is entitled to judgment.

As to trying the issue in fact, and assessing contingent damages before arguing the demurrer, the practice is settled that the plaintiff has a right to elect to carry the cause down to trial, either before or after the demurrer is determined.

Judgment for the plaintiff.

(a) So to a plea setting forth an award, a rejoinder that the award was not final. *Barlow v. Todd*, 3 Johns. Rep. 367.

[1] What shall be deemed a good submission and award considered in *Hays v. Hays*, 23 Wend. 368. See cases relating to awards in, 22 Wend. 125.

WILLIAMS v. DELAFIELD.

WILLIAMS *against* DELAFIELD.

The arrival of a vessel, at a port insured to, from a port insured from, though she may have sailed subsequent to the vessel insured, affords no ground for presuming the assured had any knowledge of the bad weather the arriving vessel had sustained, nor that the assured received information of the sailing of his vessel by the one which arrived, when circumstances show it might have been received in another way. A representation saying, "I am informed of the vessel's sailing, and she is out this day twenty-six days," is not an assertion as a fact, that she is out twenty-six days, and, therefore, is not a misrepresentation, though she may have been out twenty-seven. If a vessel be insured as out of time, and she be out one day more than the information received specifies, if the jury do not find it to be material, the court will not say it is so.

ASSUMPSIT upon a policy, on the schooner Margaret, from Cape Francois to Baltimore.

The insurance was effected *on a written representation, dated Baltimore, 3d January, 1802, but [330] in fact, extracted from a letter of that day, addressed by the plaintiff to his broker, and was in these words: "I have information of her sailing, and she is out this day twenty-six days." From this circumstance 7 per cent. was paid on the vessel, though her cargo had been insured at four, but the three per cent. extra was given in consequence of her being out of time.

On the trial it appeared that a Captain Weaver, who had sailed from Cape Francois on the 13th of December, 1801, had arrived at Baltimore on the 28th of the same month, having experienced a storm of 39 hours, which he communicated to his owners, and that his arrival had been mentioned in the newspapers of that place. After being there several persons inquired for the Margaret, one of whom, but not the plaintiff, expressed his fears of her being lost. At the time of making claim on the underwriters, there was exhibited, as proof of loss, a certificate of the Margaret's having sailed on the 7th of December, 1801, from Cape Francois for Baltimore.

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This was enclosed in a letter, dated Baltimore, 18th of December, 1802, in which the plaintiff said, "My information, with respect to the sailing of the *Margaret*, was only verbal from a captain who had just arrived from the Cape, and mentioned that the *Margaret* had sailed three days before him. This, from the passage which he said he had had, would make her time of sailing on the 8th, but from the certificate which I received from the West Indies it appears she sailed on the 7th. I do not expect that one day can make any difference." These circumstances and papers being given in evidence, the defendant contended the policy was void from misrepresentation and concealment. The judge charged, that if the jury believed the plaintiff's information, at the time of the *Margaret's* sailing, was derived from Captain Weaver, who communicated also the storm he had encountered, which was withheld, and that it was material whether the vessel sailed on the 7th or 8th of the month, they ought to bring in their verdict for the defendant; if otherwise, for the plaintiff, in favor of whom the jury found.

Pendleton, for the defendant. We apply for a new trial on these grounds; 1. There were material concealments, which annulled the contract; 2. There was a material misrepresentation in stating the *Margaret* to have been out 26 days. The circumstances of the arrival of [*331] Weaver being announced *in the newspapers, and the various inquiries made respecting the *Margaret*, are enough to presume the assured informed of the storm which Weaver encountered. This, being on the same voyage, ought to have been communicated, as it is probable vessels pursuing the same route, experience the same weather. It would therefore, have increased the risk, and consequently the underwriters' calculation. An omission to disclose an important fact, though it be through accident, or inadvertence, is fatal. 1 Marsh. 347, 349; 1 Emer. 20; *Fillis v. Bruton*, Park, 182; 1 Marsh. 348. The

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assured is bound to be precisely correct when he undertakes to specify time. A suppression of part of what is known destroys the policy. *Ratcliffe v. Shoolbred*, Park, 181; *M'Andrews v. Bell*, 1 Esp. Rep. 373, is within the letter of the present case. There the assured had information, by a letter dated the 8th of November, that his vessel was ready to sail. On the 2d of December, after the arrival of a ship which sailed on the same day as his, he insured, without communicating this circumstance, and Lord Kenyon ruled it to vacate the policy. So in *Rook v. Thurmond*, Mill. 57, and *Stewart v. Morrison*, the withholding that the information was received by a subsequent vessel, was held to avoid the contract. However innocent a concealment may be, and though by a broker, the effect is the same. *Shirley v. Wilkinson*, Doug. 306. The whole of what the assured knows ought to be laid before the underwriter. *M'Dowal v. Frazer*, Doug. 247. If from what the plaintiff was told, he drew an inference of a fact, and asserted it to be so, he took the risk of that upon himself. He here says the vessel was out 26 days; she had been out 27. Though this was gathered from information, it was positively asserted, and, being untrue, there can be no recovery.

Riggs and Radcliff, contra. The premium paid in this case was expressly for a vessel out of time, and on that account an advance of 75 per cent was made. To a vessel avowedly out of time a day is immaterial; as for a vessel in time, a variation of the period she has been out is unimportant. In *M'Kay v. Rhineland*, 1 Johns. Case, 408, decided in 1800, the representation was, that the ship had been out nine weeks, when, in truth, she had been out ten; but, as it was within the period of the voyage, it was held immaterial. Whether a fact be so or not is for jury determination, and they have, in this case, decided the question. The authorities cited apply where information is suppressed, or unintentionally omitted *in a [*332]

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material point, or where the party undertakes to affirm positively, and it turns out otherwise. Neither of these classes include the present case. The argument of concealment arises from an unwarranted presumption, first that the knowledge of the sailing of the *Margaret* was derived from Weaver, and then another presumption that he communicated an account of the storm he had encountered. By comparing the two letters of the plaintiff, read in evidence by the defendant, and, therefore, his testimony, it appears that the information received by the plaintiff was from a captain who sailed three days after the *Margaret*. This must have been then by a person who left the Cape on the 10th. Weaver sailed on the 13th. In the next place, if the computation of time be that by which a seaman would reckon, and, as it seems to have come from the master of a vessel, this is likely, the *Margaret* would, according to the computation allowed in *Dennis and Williams v. Ludlow*, (ante, 116,) have been out exactly 26 days. It is necessary only to add, that the plaintiff gives the time merely as matter of information received, and not as a positive assertion.

Boyd and Pendleton, in reply. If a vessel be out of time, every day is more and more important. Whether a representation be material or not, is a question of law arising from the fact, and, therefore, not for a jury, but the court to determine.

SPENCER, J. delivered the opinion of the court. The motion for a new trial is made on two grounds; 1. A material concealment;(a) 2. A material representation as to the time the vessel was out. The concealment is supposed to consist in not communicating the storm, and all that Captain Weaver might have related. But Captain Weaver does not pretend that the plaintiff knew of his arrival. He states that about a week after he arrived, a Mr. Hillian,

(a) See *Ely v. Hallett*, ante, 57, and note to that case.

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who was interested in the cargo of the *Margaret*, inquired of him when she sailed, expressing at the same time his fears that she was lost. To make out the misrepresentation, the defendant relies on the two letters adduced by him in evidence; contending that by the first there was a positive assertion of the *Margaret's* being out 26 days, when by the second she appears to have been out 27.

At the trial the judge fully submitted the cause to the jury, on the point of concealment, expressing his opinion to them pretty strongly that there had been a material concealment; *with respect to the difference [*333] of the day, he intimated an opinion that it was not a material misrepresentation. The jury by their verdict, have considered that there were no material concealments; and, unless the evidence preponderates against it, it ought not, on this point, to be disturbed. There was no evidence that the plaintiff knew of the gale which Weaver had encountered. He might or he might not. To intend that he did not know of it, and concealed it from the defendant, is to intend from mere possibilities that he had been guilty of a fraud. This would be a presumption against legal maxims, and, in this stage of the cause, against the solemn finding of the jury. The charge of withholding information from the assurer, as to the arrival of a vessel at Baltimore, which sailed three days after the *Margaret*, is equally unfounded. The plaintiff's letter of the 3d of January, 1802, in which he observes, "I have information of her sailing," sufficiently apprised the defendant that a vessel which sailed with or after the *Margaret*, had arrived. If, however, there is any pretence for deeming this a concealment, the jury have passed upon it, and considered it an immaterial circumstance. With a verdict, on these grounds, the court can perceive no reason to be dissatisfied.

The fact of misrepresentation is alleged to consist in the plaintiff's stating, as an independent and substantive fact, that the *Margaret* had been out but twenty-six days, when

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in truth she had then been out twenty-seven. But the plaintiff did not know the fact to be different from what he represented it. The court do not mean to decide that a misrepresentation of one day may not be material, and avoid a policy. They forbear expressing, in this case, an opinion on that point; but they are clearly of opinion, that when the plaintiff represented, "I have information of her sailing, and she has been out this day twenty-six days," in good sense and strict construction, the information was applicable as well to the sailing as the time she had been out. The court, therefore, deny the motion, with costs.

New trial refused.

THE PEOPLE *against* VAN WYCK.

A *subpoena* ticket for a person to attend as a witness in this court is good, though it does not specify the place where to be held. So if it be to testify in an indictment in this court, when that against the party named is in the *oyer* and *terminer*. Cause may be shown against a rule for an attachment by affidavit, the party not being bound to appear in person.

On a motion by the attorney-general for an attachment.

The ground of application, and objections to it, being contained in the decision, it is unnecessary to relate the argument by counsel.

[*384] *LIVINGSTON, J. delivered the opinion of the court. In November last a rule was obtained by the attorney-general, calling on the defendant to show cause, on the first day of this term, why an attachment should not issue against him for not appearing as a witness *re: rean* the People and Richard Riker, after being regularly

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served with a subpoena. The defendant shows for cause, and by affidavit, without personally appearing in court, that "a ticket, which is annexed to his affidavit, was served on him, but that no subpoena was shown to him at the time and further, that there was an indictment pending in the oyer and terminer against Riker, who was bound to appear in that court, and not at the term."

It is insisted that the defendant should have shown cause in person, and that the facts disclosed by his affidavit, if cause can be shown in that way, are not sufficient to prevent the rule for an attachment being made absolute.

In the case of *The People v. Freer*, 1 Caines' Rep. 485, cause was shown, as here, by affidavit, and although the court say that "on such occasions the defendant ought to appear in person and answer," that point was not raised, and of course ought not to be regarded as settled.

Nor is it important to ascertain what is the mode in England. In a point of practice, and this is nothing more, we certainly may adopt a rule for ourselves, and alter it again if it become inconvenient. We all think it would produce great oppression, and unnecessary expense, to compel a party, who may be perfectly innocent, on a rule to show cause, to appear in person. Why bring a man from Ontario to New York, to swear that he was sick, and therefore unable to attend on a subpoena, when that fact can be as easily communicated by his affidavit properly taken? An attachment might almost as well go in the first instance. We, therefore, think the defendant's personal attendance was unnecessary.

The merits of his affidavit are next to be examined. It appears by the ticket left with him, that the name of the city in which the court was to be held is omitted, *Bodwell v. Willcox*, ante, p. 104. The terms of this court, and the places of its meeting being regulated by a public act, we think the ticket good, notwithstanding this omission, especially too as the defendant does not pretend ignorance on this head, and is a counsellor of this court. Neither is it

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important that the indictment, on the trial of which he was to testify, was found, and then pending, in theoyer and terminer. The attorney-general could have [*335] brought *it into this court for trial, on the return day of the subpoena, which would have been sufficient.

The greatest difficulty arises from the defendant's denial that a subpoena was shown to him at the time of leaving the ticket. But as the officer who served it swears positively to this fact, we think some further explanation necessary. The defendant does not say that a subpoena was at no time shown to him, nor that this was the only ticket he received. It is probable the officer, on recollecting the mistake, may have returned and shown it, or that he made an entire new service, or that something may have passed rendering the exhibition of a subpoena unnecessary. At any rate, we think this matter ought to be further inquired into, and that therefore the rule for an attachment be made absolute.

Attachment ordered.

JACKSON, *ex. dem.* CLOWES, *against* HAKES, tenant.

An ejectment is merely a possessory remedy, and therefore if a landlord, in possession, bring it to bar the right of his absconding lessee, it cannot be maintained.

WOODWORTH (Attorney-General) moved to set aside the judgment and execution in this cause for irregularity, on affidavits, the facts of which were shortly these :

The defendant, being a tenant, absconded whilst rent was in arrear, upon which the lessor of the plaintiff took possession of the premises, and, when thus in perfect enjoyment of them, brought an ejectment under the 23d section of the

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act "concerning distresses," &c. (1 Rev. Laws, 142,) in order to bar the tenant's right under the lease, as if the premises had been then vacant.

Foot (District Attorney) strongly contended, that though the lessor of the plaintiff was then actually in the occupation of the lands, they were, even as to him, in the eye of the law, regarded as vacant, because the only possession known to the law was that of the tenant. That if this were not so, the landlord of an absconding tenant would be in a worse situation when in possession of the demised property than when out of possession; because, if he was out of possession, he might, after a suit and lapse of six months, get into the possession and keep it; but if in possession, he was never sure of retaining it, as the tenant might, at any time, turn him out. From these considerations he insisted that the only mode of barring the interest of the lessee was by adopting such proceedings as he had in the present case advised. That they were grounded
*on an affidavit which was framed, with the [*336]
caution necessary, to comport with the peculiar situation of the lessor of the plaintiff, who could not swear there was no sufficient distress on the premises, because his own cattle were there, but that there was no sufficient distress belonging to the tenant.

KENT, Ch. J. Take the effect of your motion with costs. It is absurd to sustain a suit in such a case. It is against the whole theory of the action. The proceedings are an absolute nullity.

Motion granted.

Sayer v. Finck.

SAYER against FINCK.

An opinion of a plaintiff's attorney, that a cause on the day docket will not be brought on, will not, in future, be a reason for setting aside an inquest, taken in the absence of the defendant's attorney, though accompanied by a strong affidavit of merits, notwithstanding it was allowed in this case.

HOPKINS moved to set aside the inquest taken in this cause at the last sittings, New-York, on an affidavit by two persons, that the debt for which the action was brought had been paid, and on another affidavit by the defendant's attorney, stating that he did not attend when the cause was called on, because, from a conversation with the partner of the plaintiff's attorney, and who he thought was attorney also for the plaintiff, he was led to imagine the trial could not be had on that day, as there were eighteen prior causes on the day docket, and that the plaintiff's attorney himself would not attend.

Per Curiam Let the inquest be set aside on payment of all costs. The court grant this only under the peculiar circumstances of the case. It appears that the defendant's attorney thought he was conversing with a persons who was acting as attorney for the plaintiff. This belief might easily be induced from this circumstance, that the attorney on record and the person spoken with were in partnership. It was, however, but an opinion of the adverse attorney that the cause would not be heard. We shall, in future, expect more explicit reasons for thinking a cause will not be brought on. The affidavit of merits is very strong. Taking this, together with the misapprehension of the defendant's attorney, that the partner of the plaintiff's attorney was absolutely concerned in the suit, are the grounds of our present determination.

Motion granted on costs.

Winter v. Bank of New York.

***WINTER *against* THE PRESIDENT AND DIRECTORS OF THE BANK OF NEW YORK. [*337]**

If two persons enter a bank at the same time, one with money and the other without, the latter of whom informs the cashier it is to be deposited on his account, this circumstance alone, without any acts of the other party confirming such account, will not justify the cashier in carrying the money to the account of the party saying it is his; if he do, and pay money or give credit, on the strength of such deposit, to such person, the bank must bear the loss if any arise.

ASSUMPSIT, to recover one thousand dollars had and received by the defendants to the use of the plaintiff.

From the evidence at the trial, these appeared to be in substance the circumstances of the case: The money in question was one of several consignments to different people, shipped under regular bills of lading, from New Orleans to New York. On the captain's arrival, as the consignees did not come for their property, he put the whole into a box, in order to deposit it into the bank, but when he got there he found the hours of business over, and the outer doors just closed. At this moment, one Arnold, with whom he had formerly been acquainted, stepped up to him, and told him, if he wanted to go into the bank, he might still enter at the back door, and that he would show him the way. This proposal being accepted, Arnold, followed by the captain with the cash, proceeded to the back door, and went into the bank. So soon as they had entered, Arnold, leaving the master with his money, pushed on to a further part of the building, where the cashier was sitting, and informed him, in such a manner, however, as not to be heard by the captain of the vessel, that he had brought about \$4,000 to deposit, which he begged to be received. This being consented to, he then requested to have given up to him, and obtained, a note that was over due, his check for \$1,600 certified to be good, another note, under protest, credited to his account

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as paid, and a note of one Armstrong's for \$1,400, deposited as a collateral security for one of his own for \$750. Having accomplished his object he took his leave.

While these things were transacting with the cashier, the captain was inquiring of the porter and one of the clerks whether his cash could not, though after banking hours, be received for the night. Being answered in the affirmative, he asked at what hour he could come to count it; and, upon being informed the next morning at ten o'clock, he assisted the clerk in removing it into a back room, where he left it and went away. On returning the morning after, he demanded his money which was delivered to him, when he counted it out and immediately afterwards inquired for the *cashier to deposit it with him, on account of the consignees. On going to him an explanation took place, which ended by the captain's showing the bills of lading, and the bank's refusing to pay the money to the consignees, in consequence of which the plaintiff commenced the present action, and obtained a verdict. The defendants now applied to set it aside, as contrary to evidence.

The only question was, whether the conduct of the captain was, from the testimony, such as to sanction the fraud of Arnold, and thereby throw the loss on the consignees, in capacity of whose agent he then acted?

The arguments of counsel being directed only to show how the balance of evidence would turn, and that being accurately weighed in the opinion of the court, it is unnecessary to do more than state the decision, which was delivered by

SPENCER, J. After a verdict for the plaintiff, under an unexceptionable charge from the judge who presided, the court are called upon to set aside this verdict, as against the weight of evidence. There is no imputation of fraud or design either in the captain, Living, or the officers of the bank. But the question is, who produced the mistake?

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2 Wash. Rep. 245. It is a principle, not controverted, that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. Testing the evidence by this equitable principle, I proceed to examine the conduct of Captain Living; for, if there has been no culpability on his part, the plaintiff is entitled to recover.

He states, that not having been called on by the consignees of the money which he had brought from New Orleans, he thought it best to deposit it in the bank; he arrived there after it was closed, and there met with Arnold, by whose directions he went to the rear part of the bank, met with the porter and one of the clerks, to whom he communicated his wishes to deposit the money, and after some conversation it was left in the bank for safe keeping, Captain Living observing that he should come the next morning at the opening of the bank and deposit it. Arnold, it seems, informed the porter of the bank that it was his money, and this claim was twice repeated in the presence of Captain Living. If he had heard this conversation, and remained silent, it would have brought him within the rule of enabling a third person to occasion the loss. But he says that owing to deafness he did not hear what passed. It has been urged that this infirmity of Captain

*Living ought to have rendered him more circum- [*389] spect, and, as he must have seen Arnold conversing with the porter, he should have been more explicit, having been warned that Arnold was a dangerous man. It is, we think, not a correct position, that Living was blamable in not contradicting what he did not hear, and could not have imagined; the infirmity of deafness, instead of being a misfortune, would savor of culpability, and, inasmuch as Living was the bearer of the money, as he never enabled Arnold to occasion the loss, and the omission arose from the officers of the bank in not asking him if this money was Arnold's, and as the whole merits of the case have been considered by a jury, who have decided in

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favor of the plaintiff, we do not think it a verdict against the weight of evidence, and therefore refuse the motion for a new trial.(a)

New trial denied.

GRAVES AND SCRIBA *against* THE MARINE INSURANCE COMPANY.

If an insurance be on a return cargo, beginning the adventure "from, and immediately following the loading thereof on board the said vessel," at the port of destination, with liberty to touch and trade at two intermediate ports, the policy will not cover the outward cargo from the port of destination to one of the intermediate ports, though the vessel was obliged to carry it there, in consequence of being refused permission to enter that of her destination; the *premium*, therefore, must be returned, as the risk never attached.

ASSUMPSIT, for money had and received, to recover back the amount of *premium*, paid for insurance.

The facts were these: The plaintiffs shipped for La Vera Cruz a cargo, fully covered by other policies, in the usual form, and then effected the one on which the present action was brought, upon the return cargo, "beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at La Vera Cruz, and so, &c., until the said goods shall be safely landed at New York," with liberty to touch and trade at New Orleans, or the Havannah. On the outward voyage the vessel was captured, carried into Jamaica, detained there two months, liberated, and arrived at her place of destination, where she was not permitted to

(a) Money paid into the hands of a clerk in a bank, who is not the regular receiving clerk, nor at the time acting in aid of such receiving clerk, is not a payment to charge the bank; and if the clerk to whom it has been made abscond with, or embezzle the money, it is the loss of the person who paid it to him. *Manhattan Company v. Lydig*, 4 Johns. Rep. 377.

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discharge her outward lading, or even remain within the port, although in distress from her mast being sprung and short of provisions and water. Thus circumstanced, she was, with her original lading on board, and without taking in anything in addition to it, compelled to depart for the nearest port she could make. She accordingly sailed for New Orleans, and there loaded with a cargo for New York, to the full amount of *which a policy [*340] had been underwritten previous to that subscribed by the defendants. A verdict having been taken for the plaintiffs, the case came before the court on this simple question, whether the policy ever attached? If it did not, the verdict to stand; if it did, to be entered for the defendants.

T. L. Ogden, for the plaintiffs. The goods insured by this policy never were on board. They were to be taken in at La Vera Cruz. By the outward policy, the cargo from New York may, perhaps, have been protected even to New Orleans, as the going there arose from an interdiction of commerce. 1 Emer. 542. If so, the plaintiffs were perfectly covered, out and home, without the policy subscribed by the defendants. For the case specifies there was one on the cargo from New-Orleans to New York, effected previously to that now in question. It is clear, therefore, that there was not a moment of time in which the defendants could be liable. Independent of this, the words of the policy are conclusive.

Riggs, contra. That the plaintiffs were protected in the voyage from La Vera Cruz to New Orleans, by the outward policy may be the law of France, but certainly is not that of this country. Stress of weather may justify going to a port not mentioned, whilst in the prosecution of the voyage insured, but after the *iter* is concluded, the policy never can warrant going on a new voyage and to a new port. The case of *Vredenburg* was decided on prin-

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principles analogous to those for which we contend. That is, that our policy attached on even the outward cargo from La Vera Cruz to New Orleans. It was in the route of the very voyage we insured, and covered the goods, though not absolutely shipped at the port specified in the instrument. In the determination I have alluded to, the cargo was shipped at New York, but this court held it within a policy on goods from the West Indies, containing the very clause upon the construction of which we now dispute. The reasoning there was, that being a trading voyage, like this, any goods at the place from whence the insurance was to take effect, were within it. The same rule was adopted at *mis prius*, in *Slaight v. Rhinelanders*. There, some salt brought from a foreign port was held to be within a policy on goods shipped in New York. We were liable from La Vera Cruz to New Orleans. Had the loss happened even after leaving this last place, we must have paid [*341] and could only have called *on the insurers on the other policy for contribution. We, therefore, are entitled to retain.

Hoffman, in reply. This last argument is an attempt to introduce the English doctrine of contribution among underwriters, in the teeth of the clause in our policies. The insurance, when effected, was on a cargo contemplated to be laden on board at La Vera Cruz, and no other can be covered by it. In *Slaight v. Rhinelanders* the salt had been entered here, and was destined for the voyage insured. In *Vredenburg's Case*, the cargo was shipped for the voyage insured. There never was an instant in which the defendants were liable on their subscription, and therefore they must restore the premium.

LIVINGSTON, J. delivered the opinion of the court. The premium on this insurance cannot be retained. The policy in explicit terms declares, "the adventure shall begin from, and immediately following, the loading of the goods at La

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Vera Cruz." At this port, whither the outward cargo was insured, the Alert was not permitted to unload, or to remain in port, whereupon she sailed for New-Orleans in distress.

The parties clearly intended to insure only such goods as were taken on board at La Vera Cruz; or, in other words, the return cargo. Independent of the unequivocal terms made use of, the plaintiffs could not contemplate bringing back to New York the property they had sent abroad; the warranty also of its being American, might have been true of the one cargo and not of the other. Whether the outward policies, by the denial of an entry at La Vera Cruz, continued or not, after the vessel's departure thence, will make no difference. The hazard which the defendants would have run, on their present construction, is much greater than the one they actually assumed. Would they not have asked a higher premium for insuring goods which had been several months at sea, and might have been greatly damaged, on board of a vessel too, which had suffered a long detention by capture, whose masts were sprung, and which was otherwise in a shattered state, and short also of provisions and water, than for underwriting a cargo laden at the place where the policy was to attach, and on a vessel thoroughly repaired, and properly found for the voyage she was undertaking? If these goods were really intended as the subject of insurance, the defendants could never have been called on for a loss, inasmuch as the vessel was not repaired, provisioned, or watered, as she ought *to have [*342] been. To what cause this was to be ascribed is of no importance, it always being part of the contract that such shall be the condition of every vessel at the commencement of a voyage. But here it is conceded, that her distressed plight was owing to perils insured against by former policies, and evinces that the defendants did not mean to take her up until after her safe arrival at La Vera Cruz. Again, is it not a part of the understanding, that

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the goods shall not have been damaged by the sea when the voyage begins? Who can say this was not the case here? Suppose at New Orleans the cargo had appeared so much spoiled as to justify an abandonment, or a claim for a heavy partial loss, how was it to be ascertained when the injury happened, before or after leaving La Vera Cruz? In this way the defendants would have been exposed to a loss which had been occasioned in a part of the *tier*, during which it is not pretended they ran any danger. When it is agreed, then, that the risk shall commence from the loading of goods, at a particular port, this is so far from being a nugatory provision, which we have a right to say means nothing, that the underwriter has a palpable interest in exacting a literal compliance, or to consider himself exonerated. These arguments, although not urged at the bar, are conclusive in favor of the plaintiffs. But in *Vredenburg v. Gracie*, it is said a different construction was given to this clause, and that the goods shipped at New York were considered as covered by the policy, although the adventure was to begin from their loading in the West Indies. Such a decision certainly took place; but it appeared that the underwriter was informed that the goods intended to be insured were shipped from New York, and that the vessel had proceeded to the West Indies (where she was at the time of subscribing the policy) without insurance. A letter was also shown to him, stating the vessel's arrival at Cape Nicola Mole, where she had disposed of a small part of the cargo, and was about proceeding to St. Mark's with the residue. This explanation, which was admitted, presents a very different contract from the one on which we are now deciding, and which, therefore, cannot be governed by it. It was a trading voyage in the West Indies, where it is not usual to carry produce of one island to another. It was also, by the express understanding of the underwriter, a policy on goods shipped at New York, and the vessel being already in the West Indies, that part of the world was only mentioned as the place where the risk

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was to commence. *But with all these explanations, we well remember that one of the first counsel who ever appeared at this or any other bar, and who was concerned with me for the plaintiff in that cause, entertained a very strong opinion that our client would have to apply to a court of chancery to amend his policy, to enable him to succeed in a court of common law.

From this view of the question, it is not necessary to say how the interdiction to trade at La Vera Cruz affected the prior insurances. Whether they terminated there, or continued during the route to New Orleans, our opinion is the same.

The cargo taken in at New Orleans being covered by prior insurances, the defendant was of course at no risk after the schooner left that place, and thinking, for the reasons mentioned, that the policy did not attach during her voyage from La Vera Cruz to New Orleans, the plaintiffs must have judgment.

Postea to the plaintiffs.

 JACKSON against RICHARDS.

If a note fall due on a *Sunday*, payment must be demanded on the *Saturday*.

An endorser of the promissory note of an insolvent is not chargeable without a previous demand on the maker, and notice, though the endorsement has been without any consideration, and merely to give currency to the paper. Notice to the endorser, if previous to a demand on the maker, is bad, though it be on the first day after the expiration of the days of grace.

ASSUMPSIT by the holder of a promissory note against the second endorser.

The maker being indebted to some English creditors, the plaintiff agreed to take his note for 15*l.* in the pound, with two endorsers. In consequence of this arrangement, the

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note in question was made, and delivered over to Jackson. The three days of grace expiring on Sunday, and the maker having become insolvent, notice of non-payment was given to the defendant on the Monday following, but, before any demand on the drawer, which, though on that day, was not made till after the notice of non-payment. The case was submitted without argument on the following points: 1. That the note becoming due on Sunday, demand of payment was not requisite until Monday; no usage being shown requiring demand before the expiration of the three days of grace; 2. That the rule by which in such cases demand is necessary on Saturday, is applicable to bills and not to notes; because as to them the law is satisfied if made within a reasonable time; 3. That as the maker was insolvent, and the name of the defendant endorsed to give the note credit, regular demand was not required; 4. That no injury to the defendant has [*844] arisen from the *want of a more regular demand, and the court ought not to enforce any strict rule against the plaintiff, even if the demand was not strictly regular.

KENT, Ch. J., delivered the opinion of the court. This case presents two questions: First, whether the usual and due means have been taken to fix the defendants as endorser of the note? Secondly, if not, then, whether the circumstances of the case rendered those means unnecessary? Generally, to fix an endorser, the holder must demand, or use due diligence to get, payment of the maker when the note becomes payable; and, on his default, he must use due diligence in giving notice thereof to the endorser. The demand of payment from the drawer must be made on the third day of grace, and within a reasonable time before the expiration of the day. Bayley, 59, 67; Chitty, 148; 2 H. Black. 386, 387. If the third day be Sunday, demand must be made on the second day. This was the established usage as early as the time of Lord Holt,

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in the case of foreign bills, and it has since been extended equally to inland bills and notes of hand; for inland bills and notes are payable at the same time as foreign bills, and there is no material difference between them. *Tassel and Lee v. Lewis* 1 Ld. Raym. 743; Chitty, 141; Bayley, 66, and Marius, cited by both. See also what Lord Kenyon says in 4 D. & E. 152. In the present case, then, there was wanting due diligence in presenting the note to the maker for payment, and no reason is given why the demand was postponed from Saturday till Monday. If the demand had been duly made on Saturday, the notice to the endorser would have been sufficient on the following day; or, in this instance, on the Monday. Bayley, 76; Chitty, 158. *W. & I. Titus v. Bowne*, July term, 1798. But here the notice was given even prior to the demand upon the drawer, and was consequently null, as the drawer was not in default when the notice was given. From the reason, then, that the demand was not made on Saturday, and that the notice was prior in point of time to a default in the drawer, the requisite steps were not taken to charge the endorser, and he has a strict right to avail himself of the laches of the holder in his discharge, unless there be some peculiar circumstances in this case to take it out of the general rule. It has been laid down by the court of C. B. in the case of *De Berdt v. Atkinson*, 2 H. Black. 386(a) that the payee of a promissory note endorsing it to give it currency, and knowing of the insolvency of the maker at the *time of such endorsement, cannot [*345] insist on the want of demand and notice, because he was not an endorser in the common course of business, and cannot be affected by the want of notice. The same point was afterwards ruled by Buller, J. at *nisi prius*, 1 Esp. Rep. 303. But within two years subsequent to the

(a) On the authority of this case Lord Ellenborough ruled, that notice to a payee of a bill, endorsing with a knowledge that the drawer had no funds in the drawee's hands, was unnecessary. *Sisson v. Tomlinson*, Selwyn's N P. 29, (n.)

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first decision, the same court of C. B. decided directly the contrary in the case of *Nicholson v. Gorlith*, 2 H. Black. 609. We think the reasoning in the last decision the best and ought to be followed.(a) When a person signs a note in the character of endorser, the presumption is, that he is to receive all the privileges of that character. If he meant to be absolutely bound as a co-debtor, he would have signed the note jointly with the drawer, or this meaning would have been in some other way declared. An endorsement for the credit of the drawer, and without receiving value, is not unusual in the ordinary course of business, but it would be inconvenient and injurious to dispense with the settled rule of the previous demand and notice in all such cases. It is, no doubt, the general understanding of the parties when negotiable paper is endorsed, that the legal consequences shall attach to that endorsement. There is no imputation of fraud or want of faith in this case. It is not analogous to the case of a drawer of a bill, drawing without funds to uphold his draft, and who is properly chargeable without notice. We are therefore of opinion, that judgment ought to be entered for the defendant.

Judgment for the defendant.

(a) Perhaps the two cases may be reconciled by considering that in the first the endorsement was on mere accommodation paper to raise money; that in the latter the endorsement was by way of security.

NEWKERK AND WIFE AND ROOSA *against* C. NEWKERK,
C. P. NEWKERK AND DUBOIS AND WIFE.

A devise of "all my right in the patentees' woods, to my children, in case the same continue to inhabit the town of Hurley, otherwise not," passes the fee, if there be one in the testator, and is a condition subsequent, if it be a condition at all, but is, *et cetera*, void, as repugnant to the nature of a fee. It is not a limitation for want of a devise over; and if the devise itself be to the testator's heirs, it is void as a condition; because the devisees themselves would be the persons to take advantage of it. A residuary clause of a testator's "whole real estate, except what I have before disposed of," will not carry an estate previously devised on condition, nor does it operate as a conditional limitation.

In partition from the common pleas of Ulster county. The defendants had pleaded that the plaintiffs did not hold in common with them, in manner and form, &c., upon which issue was taken, and a verdict rendered by consent, subject to the opinion of the court on the following case.

In 1787, Cornelius Newkerk, deceased, being seized in fee of several undivided portions of land, in a tract called the Patentees' Bos, or Partners Wood Land Tract, so named from having been originally purchased by nine persons, entered into *articles of agreement with [*346] the then proprietors, by which they mutually covenanted that their respective shares should forever remain uncultivated, and in common among them, their heirs and assigns, "being residents in the town of Hurley," for their respective proper uses, "within the limits of the town of Hurley," even though partition should be made of the same, "provided always that they be residents in the town of Hurley aforesaid, the said parties, each one of them for themselves, and for their respective heirs and assigns, covenanting, granting and agreeing to and with each other, and the heirs and assigns of each other, that they will not give, grant, bargain, sell, convey, or otherwise dispose of their respective right, title, or interest in

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the said tract or parcel of land, (not now enjoyed in severalty,) to any person or persons not residing in the town of Hurley aforesaid." On the 15th of September, 1787, he duly made and published his last will and testament, dated at his house in Hurley, by which he devised all his "right in the woods of the patentees, to all his children, and also his son Airy's son Peter, in case the same continue to inhabit the town of Hurley, otherwise not." In a subsequent clause, he says: "It is my will and desire, and I give by these to my before-named two sons, Philip and Cornelius, my whole real estate, except what I have ordered and disposed respecting the woods of the patentees, to be divided between the two, for them, their heirs and assigns forever."

In February, 1788, the testator died, leaving two sons, Philip and Cornelius, four daughters, Jannetje, the wife of Benjamin Roosa, Leah, the wife of Garret Newkirk, Hendrica, the wife of Cornelius Dumond, Arriantje, the wife of Petrus Dubois, and his grandson Petrus, the son of Airy.

In 1789, by the act of the then colony, the Patentees' Bos was annexed to Hurley, within which it was not comprehended by the patent and incorporation of that town. In 1793, Philip Newkirk departed this life, leaving issue Cornelius P. Newkirk, Elizabeth, and Maria, who died an infant. Judgment having gone by default against those defendants not mentioned in the title of this suit, the cause came on for trial between those named, when it appeared in evidence that the testator's house, from whence his will was dated, and where he resided and died, was not, in fact, at that time, within the town of Hurley, but within the

Patentees' Bos, which, however, was generally [*247] called the town or village of Hurley. That *his daughters, Leah, the wife of Garret C. Newkirk, and the other plaintiff, Jannetje Roosa, at the period when the will was made, and at that of the testator's death, were, and ever since have been, inhabitants of the town of

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Rochester, and not of Hurley. That Peter, the grandson, was, both when the testator made his will, and when he died, an infant, residing sometimes with his mother, in the town of Kingston, and sometimes with Peter Dubois, in Hurley, but now living in Dutchess county. That Peter Dubois and Arriantje, his wife, from the date of the will to the present time, were residents in the town of Hurley. The question was whether, under these circumstances, the plaintiffs could claim any estate in the Patentees' Bos, by virtue of the above devise?

L. Elmendorf, for the plaintiffs. I shall contend, 1. That by the words "all my right," which the testator has used, a fee is passed; 2. That the inhabitancy required is a condition subsequent; 3. That as there is no limitation over, no estate can be raised on the breach of this condition; 4. That the condition is too uncertain to create a forfeiture, and is also repugnant to the nature of the estate, and therefore void. On the first point. In a devise, any words which comprehend all the testator's interest pass a fee if he has a fee to pass. In the *Countess of Bridgewater v. Duke of Bolton*, (1 Salk. 236,) "all my estate" was held to carry the fee. So in *Hogan v. Jackson*, (Cowp. 299,) all "effects real and personal;" "because," says Lord Mansfield, "if the words denote the *quantum* of interest, the *whole* extent of such his interest passes." *Ibid.* 306. The terms here are tantamount; and thus, being a principle settled, it would be dangerous to refine upon them. *Barry v. Edgworth*, 2 P. Wms. 524. The introductory words of this will profess a disposition of the whole of the testator's interest, and, therefore, must be considered in expounding the meaning of any doubtful expression. *Loveacre*, ex dem. *Mudge, v. Blight et Ux.*, Cowp. 352. "All personal and real estates" carry everything. *Chester v. Chester*, 8 P. Wms. 58. If so, why not "all my right?" In *Fletcher v. Smilon*, (2 D. & E. 656,) Lord Kenyon says, the word "all" so effectually passes everything, that a residuary clause

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has nothing to operate on. To show whether the inhabitation be a condition precedent or subsequent, we must look at what makes a condition subsequent. "Where the intent appears that the estate shall be vested till the condition be performed, it shall be a condition subsequent." [*348] *Com. Dig. tit. *Condition*, C. The forfeiture, if any, was not to be till after they had ceased to "continue" to inhabit; not the mere non-residence, but the *continuance* of that non-residence, was to defeat the estate. It was, therefore, a subsequent condition; for the non-continuance cannot precede the commencement. Plowd. 23, 25; 5 Vin. 77, pl. 32. Time must be allowed to take possession, and begin to inhabit. If a condition depend on a party himself, he has his whole life to perform it. Co. Litt. 308, 309; *Thomas v. Howell*, Skin. 320. "A devise to I. S. so long as he shall have issue, is to his death." Pow. on Dev. 257, 258. It is further manifest that the condition is subsequent, because, as is before observed, the devise of *all* the testator's right left no *residuum*, and as the will purports to be a disposition of the whole estate, the intent was, that every part should pass instantly. "Though, in grants, estates shall not be till the condition precedent be performed; yet, it is otherwise in a will; for the will shall be guided by the intent of the party." 5 Vin. 77, pl. 31. It is plain there is not, in the part of the will upon which the present question arises, any limitation over. If, then, there be any, the residuary clause is the source from whence it must spring. Now it is settled, that a devise of a *residuum* is not a devise over, because the testator has not that in contemplation. *Wheeler v. Brigham*, 1 Wils. 138. The condition was merely *in terrorem*, and, therefore, though not complied with, works no injury. *Pulling v. Reddy*, 1 Wils. 21. It vested in the devisees, and could not go over to the residuary legatees. *Ibid.* It cannot be a limitation. To create that, a devise over is necessary, and then, upon non-performance, the ulterior estate instantly vests without entry.

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Com. Dig. tit. *Condition*, let. T.; Pow. on Dev. 257, 258. If it be a condition, the heirs must take advantage of it; and here those heirs are the devisees themselves. The testator never meant to disinherit some for the benefit of others. The uncertainty, therefore, makes it void. It is repugnant also to the nature of the estate, that a fee-simple should be constantly resided on; for this is in effect to prevent its being alienated, and such a condition, all the books agree, would be void, but the estate remain absolute. Co. Litt. 228; *Bradley v. Peixoto*, 8 Ves. jun. 824. Against this the covenant in the articles of agreement cannot be relied on to show the testator's intent; and even if it be, we may answer it was but a personal obligation.

**Emott*, contra. The testator, at the time of [*349] making his will, was under the covenant contained in the articles. He believed them to be valid, whether they are so or not, and they, therefore, may be resorted to for the purpose of explaining what passed in his mind. Before examining the will, I shall lay down some preliminary propositions which, it is presumed, cannot be denied. 1. The intention of the testator is the polar star in the construction of devises, and will be carried into effect, if discoverable, unless against law; 2. No precise form is requisite to show this intent, and when it appears, it will control the words of the will, and be established even against them. *Strong v. Cummin*, 2 Burr. 770; *Evans v. Astley and others*, 8 Burr. 1581. Therefore, in construing a will, less deference is to be paid to authorities than the words of the instrument; 3. Where the taking of an estate depends on the performance of a precedent condition, the estate can never vest until the condition is strictly complied with; Shep. Touch. 126, 129; 4. If the precedent condition is unlawful, against public good, or subversive of the estate, it is void, and the estate can never vest; 5. That if it is the intent of the testator that on a non-performance, the estate is to go to any person except the heir, it shall

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be a conditional limitation, and not a condition ; *Page v. Hayward*, 11 Mod. 61 ; 6. That a condition describing the qualification of the person who is to take, is, in its nature, a condition precedent. *Pow. on Dev.* 247 ; *Creagh v. Wilson*, 2 Vern. 578. The case presents this question, have the plaintiffs any interest ? If they have no interest, it is enough for us, whether we have any or not. By the covenant in the articles of agreement, the property in the Patentees' Bos was to lie uncultivated, as a common, to furnish the residents of Hurley with wood, &c. It would, therefore, benefit no other person ; be no more than a commonable interest in the lands devised, under the restriction of residence contained in the articles. The words made use of show that the residence of the devisees was peculiarly contemplated. The testator does not say all his undivided interest, or estate, but "all his right in the Patentees' Woods." This was a right of common to be exercised whilst he or his alienees inhabited the town of Hurley. This right was not only distinct from, but might exceed, his estate. The word continue has not any particular force. Continue to reside, is no more in common parlance than shall reside. The estate was not intended to

[*850] *vest till the condition was complied with. Residing in Hurley was a personal qualification, which the devisees were to possess before they could take. It was, therefore, a condition precedent. *Creagh v. Wilson*. On complying with it, the parties would bring themselves within the intent of the testator, who certainly never meant to violate his covenant. The absurdity that would follow from a contrary doctrine, is sufficient to reject it ; for the estate would vest one moment, only to be devested the next. But if we err in our first construction, then we say it is a conditional limitation, and not a condition, according to the doctrine in the 5th proposition. For it is plain the testator meant that the devisees should take it as devisees, or not at all ; because the contrary would defeat the very provision, the devisees and heirs being the same ; be-

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cause, also, the residuary clause carries the property. The words are, "my whole real estate, except what I have ordered and disposed respecting the woods." This passes the reversion. *Lydcott v. Willows*, 3 Mod. 229. This shows the testator contemplated the very case which has happened, and, therefore, in neither point of view can the plaintiffs have any claim.

Harrison and Van Vechten, in reply. Though in the exposition of a will the intention of the testator be the polar star, authorities are the pointers by which we are to be directed in the search. Allowing in the present case that the condition is precedent, the plaintiffs must recover; because, till performed, the property would vest in them as heirs in common with the defendants; for a residuary clause of what is undisposed of will not operate on an estate previously devised, though upon a precedent impossible condition. The same principle will prevent its being considered as a conditional limitation. For that can be only by devise over. And if this residuary clause do not pass the property over, there is an end of the conditional limitation. By construing it to be one, the residuary devisees would take, discharged of the condition the testator seems so anxious to preserve. They are included in the clause on which the question now before the court arises. It was never meant, by the last part of the will, to give them unfettered that which was previously bestowed with a restriction. The reason of imposing any was only to prevent the covenant he had entered into from affecting his children, by making them liable to damages. If the articles operated at all, it was as a mere personal obligation, for *breach of which an action would lie. [*351] It was to exempt from this that the testator framed his devise in the manner we now see it. We have shown it is not a conditional limitation. If, then, it be a condition, it is void; because the heirs would have to enter on themselves. It can, at the utmost, be only a condition

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subsequent, in which entry and notice is necessary. This is not pretended to have been done. On every principle, therefore, the plaintiffs must have judgment.

LIVINGSTON, J., delivered the opinion of the court. This cause was very ably argued, and both parties appeared to admit it was one of considerable difficulty. It may be so, but we were well satisfied on the argument, and have seen no reason to change our opinion since, that the plaintiffs, Leah Newkerk and Jannetje Roosa, took, under their father's will, an absolute estate in fee-simple in the premises in question, in common with the other children and grand-child of the deviser, and that, therefore, they were entitled to recover in this suit.

It can hardly be doubted, that a devise of a man's right in lands will pass all his estate and interest therein, and of course a fee, if he himself have one. Right is equivalent to all right; and if all his right be devised, what is there left for others? Wills, it is known, are favorably expounded for a devisee, to give effect to the deviser's intention, who, not always being in a situation to obtain professional aid, may not use legal or technical phrases. For this reason words in devises are dispensed with, that are requisite in other instruments. Not only a fee may be thus conveyed, without words of inheritance, and an estate tail without words of procreation, but an estate may pass by implication. Nay, to give a fee-simple, it is not even necessary to use any words of perpetuity; it is sufficient that it appears to be the testator's intention to dispose of all his interest. This is implied from the use of the word estate alone. *Holdfast v. Marten*, 1 D. & E. 411; *Fletcher v. Smiton*, 2 D. & E. 656; 1 Ves. 228.

Although the word right be not so commonly used as that of estate, and, therefore, we are without decisions as to its operation and effect, there can be no danger in regarding it in legal parlance, at least in wills, as synonymous with the other. If the testator's intention be a guide, and

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it be recollected that his own children were the objects of his benevolence, no one can doubt that he considered and used it as such, and that it was his desire the devisees should take a fee in these lands.

As by this disposition, if unconditional, his children took *nothing more in these premises than [*352] they would have had as heirs at law, perhaps it may be altogether void; for, when that is the case, the heir is in by descent, which is a better title than purchase. But we are not disposed to consider the devise void on that account; not only because the defendants have not insisted on it, but more especially because such a determination could have no other tendency than to turn the plaintiffs round to another action, if we should think that, having claimed under a will, they cannot recover as heirs at law.

The effect of the condition is next to be considered. By the defendant's counsel it is insisted, that the residence here mentioned was a condition *precedent*, which must, therefore, be performed, or complied with, before the estate can vest. There are no technical appropriate terms to distinguish in all cases between conditions precedent and subsequent; for the same words may, at different times, make them the one or the other, according to the different intent of the persons who create them. Cases temp. Talbot, 184. Pow. on Dev. 246. We should be inclined to regard this, *if valid*, as a condition *subsequent*. If his children did not inhabit the town of Hurley at the testator's death, (which was the case with only one of them,) he certainly intended to afford them time to remove there. The estate, then, must have vested immediately on the testator's death, liable to be defeated by a refusal to reside in the town of Hurley. So also Arriantje Dubois, who alone of the devisees inhabited the town, would take immediately on the testator's death, but might forfeit it on a removal. Thus, if lands be given to a person on condition of executing a release of all his demands against the devi-

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tor's estate within three months after his decease, this is a condition subsequent, and the lands vest in the devisee, to be defeated or not, according to what may after happen. *Avelyn v. Ward*, 1 Ves. 420. But it is not very necessary to fix on the class to which this condition belongs, for we think it void, either because of its repugnancy to the estate devised, or as being highly unreasonable, or for its uncertainty, or on account of its being nugatory and inoperative, the same being imposed on the heirs at law, without any limitation or devise over.

It is repugnant to the estate created. A grant or devise in fee, on condition that the grantee or devisee shall not alien, is void. 5 Vin. p. 102, pl. 22. Although the law permits a man to direct what shall become of his [*353] property after his decease, *and even to annex conditions, upon the performance of which the party designated shall enjoy it, yet these conditions are not highly favored, and ought not to lay unnecessary, or improper restraints on an heir. In this light, the condition under consideration is not to be endured; for what is it, in the sense of the defendant, but a complete prohibition to alien? If the devisees were always to inhabit the town of Hurley, they could not sell. If they did, were the grantees also to be inhabitants of the same town? Or were the devisees themselves, even after the alienation, to remain there? If continuing there only while they held the estate were sufficient, they might defeat the testator's intention, by parting with the land as soon as that situation became irksome to them, unless their assigns were forever to live in that town, which would not only be a great clog on its alienation, but would be entailing a very unusual condition on the owners of this property, and one that was too have no end, which the testator had no right to do.

If there be no contradiction between the devise and the condition, or unnecessary restraint on the devisees, it is to absurd and unreasonable to be countenanced. It is

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absurd for any man to compel all his children to live in a small country village, as the condition of enjoying a piece of wood-land lying there. A thousand better situations might offer for obtaining a livelihood, or being useful to the public, and when from caprice, or any other motive, choice in this respect, which ought to be free, is denied them, courts ought not to be very solicitous to enforce a direction, which, to say the least of it, betrays more of a whimsical disposition in the testator, than of that sound sense and understanding which he professes to have enjoyed when he made his will. If conditions in restraint of marriage, *generally*, are void, as being against the reason and policy of the law, we do not perceive why one so unreasonable as that of confining a man's residence to a single spot, should not also be void. Again, it is too uncertain and unintelligible to be enforced. What precise ideas are to be affixed to the terms, "*in case the same continue to inhabit the town of Hurley?*" Is the expression equivalent to "*so long as?*" We read of an estate being granted to a man *so long as* he was parson of a particular parish, or *while* he continued unmarried, or until he had made a certain sum out of the rents, but never, until now, heard of lands being granted, *in fee-simple*, so long as the grantee *should* continue to reside on or near the [*354] property. But it may well be doubted whether we have a right to annex to these terms a signification so latitudinarian. In case a man continue to inhabit a particular spot, does not necessarily imply that he is *always* to do so; for if he continue there only a year after the testator's death, it will be, to a degree, a compliance with the condition. Once more; what is meant by "*continuing*" to inhabit? Only one of the devisees lived in Hurley at the date of the will, or when the testator died. How, then, were they to continue to inhabit a place, when they were not there at the time when the condition began to operate. But if they all lived in Hurley when their father died, of what duration was their residence there to be? Was it to

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continue during their lives, whether they sold or not—or would a shorter continuance there answer? Thus we perceive some difficulty in arriving at the real intention of the testator, and in ascertaining the meaning of the terms he has used, or the extent of the obligation with which he intended to burden his children, and if that be, in any degree, the case, it is a good reason for rejecting the condition altogether.

But if neither repugnant to the estate devised, nor absurd and unreasonable, nor uncertain, it is absolutely nugatory, and becomes void on account of the persons on whom it was to operate. These are the right heirs of the testator. If they do not comply with this injunction of residence, what is to become of the estate? Why it will still be theirs in virtue of their relation to the devisor; for neither the law, nor the will, has designated any other person to take it, or to avail himself of the forfeiture, if any accrued. Whether the devisee of the residue of an estate generally, will, in any case, control a conditional devise of a particular estate before given, or carry the same to the residuary devisee, if the condition be not complied with, is not now worth inquiring into; for the manner in which the residue is devised by this will, precludes the possibility of such a construction, for the premises in question are expressly excepted, and no condition whatever is imposed on his sons Philip and Cornelius. The testator certainly intended, if any thing, that all his children should reside in Hurley, and not any one in particular. If so, it is absurd to suppose he would absolve Philip and Cornelius (and that by mere implication) any more than his other children, from a condition which he had already annexed to a devise, made to them in common with
 [*355] their brothers and sisters. We are clearly, therefore, of opinion, that there is no devise over by this will of the wood of the patentees, and this, in a case like this, renders it very unimportant to ascertain whether the condition be valid or not, whether it be precedent or subse-

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quent in its nature, or whether it be a limitation of the estate to the devisees, so long as they resided in the town of Hurley ; for if there be no devise over, they can, being themselves heirs at law, forfeit nothing by being elsewhere. We desire, therefore, it may be understood, that we leave it optional with the defendants, to regard the words under consideration as a good and valid condition ; as precedent or subsequent, or as a limitation, and that in either and every case, the plaintiffs, in our opinion, are entitled to judgment.

It may be subjoined, that there are no words in this will from which we have a right to infer the testator intended, that those of his children who inhabited the town of Hurley should take this property to the exclusion of the others. If such were his desire, he has not indicated it by any proper expressions, and we have no right to imply it.

No notice has been taken of the agreement of 1767. It may furnish a clew to the testator's intentions, but still, if he has not expressed them by apt words in some part of the will, we cannot regard them. He may have supposed that his children's residence in Hurley was necessary to give them a right to the use of his own land, in the wood of the patentees, which, by the way, was incorrect, for that was required only for the purpose of entitling them to carry wood, &c., from the separate property of the other proprietors ; or he may have desired to avoid the penalty, which he supposed would attach, if he disposed of his lands to any person *not* residing in that town. This is probable ; but the same answer occurs. He ought to have taken care so to express himself, that a court of law, without violating its own rules, or disregarding adjudged cases, might have given effect to his intentions. In a case like this, the testator's meaning must be collected from the will itself, by attending to the several parts of it, and comparing and considering them together. Without examining whether a testator's *manifest intent* may not control the

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legal operation of words which he may use, (a question once greatly agitated in Westminster Hall, in the celebrated case of *Perrin v. Blake*,) it is sufficient to say that such intention, if it existed, does not appear, as it did in that case, by plain expressions, or necessary implications, [*356] from other parts of the will, and that if we attend to the instrument itself, without any reference to the agreement, there is no evidence whatever of the intention which the defendants wish to establish, or which would justify a construction of this will different from the one which has already been given, or from the legal operation and effect of the various clauses which relate to this subject. Upon the whole, we think the petitioners, Leah Newkerk and Jannetje Roosa, entitled each to one seventh undivided part of the premises in question, and that the plaintiffs must have judgment accordingly.

We have not examined another question, which was agitated, whether the plaintiffs can have judgment in this action, if their title disclosed at the trial shall appear to be different from that set forth in their petition; for it seems to have been conceded and understood, by both parties, from the manner of making the case, that in the event of our thinking the plaintiffs entitled to any estate under the will, whether for life or in fee, they were to have judgment.

THOMPSON, J. There can be no doubt, I think, but that all the interest, whatever it might be, which Cornelius Newkerk held in the premises, must pass under this clause in his will. There is no limitation over of any interest to which the residuary clause can apply. Still, however, I am unfortunate enough to differ from the court. There are no instruments to which the rule of construing them ought to receive a more liberal application than those of wills. When I read the above clause in this will, either separately, or connected with the other parts of the instrument, I can devise no other solution of the testator's intention, than that a residence in the town of Hurley was a qualifi-

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cation necessary for the devisees to possess, in order for the estate to vest. It, therefore, must be considered in the nature of a condition precedent, which it is incumbent on the plaintiffs to show they have complied with before they are entitled to take under this will. Whatever reason the testator might have had for imposing this condition is immaterial. There is nothing unlawful in it, nor any thing whereby it can be declared void. I therefore think that no estate vests in the plaintiffs, without a previous residence in the town of Hurley, and of course that they have shown no title to the premises.

Judgment for the plaintiffs.

ROBINSON *against* THE NEW YORK INSURANCE [*357]
COMPANY.

Under an agreement to pay a supercargo, on a voyage out and home, a gross sum out of a return cargo, or give him goods out of it to that amount, at his election, in consideration of which, he and his partner engage to sell the return cargo, free of commissions, if the vessel be obliged, on her return, to break up her homeward voyage, and the cargo be sold at the port of necessity, paying commissions to merchants there, the supercargo loses his compensation, though the proceeds of the homeward cargo be partly invested in other articles, which he brings back, and if a policy has been effected on the commissions, it is a total loss, and the insurer liable, as there is no recourse against the owners of the cargo.

On a policy of insurance on goods, with this clause underwritten: "This insurance is declared to be upon the interest of William I. Robinson, being the allowance made him, as supercargo, as per agreement made with the owners of the ship *Mary*."

The facts, as they appeared on the special verdict found in the case, were these: The plaintiff, being part owner of the ship *Mary* and her cargo, contracted with the other owners to go in her to the East Indies, as supercargo, under

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the following written agreement: "We the subscribers, owners of the ship Mary, having engaged William I. Robinson, as supercargo, on her intended voyage from hence to Batavia, and possibly to Canton, have agreed, in consideration of his undertaking and executing the duties of this trust, to pay him ten thousand dollars out of the proceeds of any cargo the ship may bring from Batavia, or to deliver him part of such cargo, to that amount, at the current market price, on arrival here, at his option. But if the ship should proceed to Canton, and the letter of credit with which he will be furnished should be availing, we in that case agree to pay him twelve thousand five hundred dollars, as above, otherwise he is to have no more than ten thousand dollars, the same as if the voyage out had terminated at Batavia, New York," &c. Signed by the owners, and the house of William and Silvester Robinson, of which the plaintiff was one. In consequence of this contract, the plaintiff and his partner entered into one with the owners, by which they agreed, "in consideration of the sum to be paid William I. Robinson, to take upon themselves the trouble of the management and sale of the return cargo, from Batavia, or Canton, free from commission, subject to the direction of a majority of the owners of the ship Mary."

The mutual compacts being thus concluded, the plaintiff insured his commissions with the defendants, showing them at the same time, the agreement under which they were to arise, and shortly after departed on the proposed voyage.

The vessel having safely arrived at Batavia, sold her outward lading, which the plaintiff faithfully in-
[*358] vested in a return cargo, *and, without proceeding further, set sail for New-York. On her passage she experienced such severe weather that she was obliged, after consultation with her crew, to bear away for St. Christopher's, and reached that port in a very disabled state. There it was deemed necessary to have a survey

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taken upon her, and for that purpose, the captain and supercargo applied for, and obtained, a warrant from the admiralty, upon the execution of which she was ordered to be unladen. Her situation was then found to be so bad, that a second warrant was, in a similar manner, asked for, and granted. Upon this, the surveyors thereby appointed made a due return, on oath, "that having accurately and carefully examined the said ship, and considered of the repairs necessary, they were unanimously of opinion that she could not be repaired for the full value of her when repaired, and that, without particularizing her several damages, it would be dangerous and unsafe to reload her cargo, and proceed with her on her voyage, and that to repair her would be highly detrimental to the interest of the owners, or underwriters. Thus circumstanced, the captain and plaintiff made a joint application for leave to sell, which being accorded, the vessel and cargo were sold in St. Christopher's under the direction of the plaintiff, by merchants there, who were paid their commissions. The plaintiff, however, bought in the vessel on account of the owners, and invested part of the proceeds of her cargo (as the laws of the island would not allow of exporting it in any other bottom) in rum and molasses, with which, being a light and buoyant cargo, she arrived, after some trivial repairs, at New-York, in the spring of the year, though inadequate to the voyage at any other season, or with her original lading, unless at an expense of more than her value.

The owners refusing to pay the plaintiff his commissions, the present action was brought. The abandonment was admitted.

T. L. Ogden, for the plaintiff. The interest the plaintiff acquired in the cargo depended on its safe arrival. The object of the insurance was, to guard against any peril which might prevent the arrival of the subject matter out of which the plaintiff's interest arose. It is like an insurance on bottomry. If the vessel never reach her port, the

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underwriter will be liable; if she do, he will be exonerated. The same principle governs in the present case. As, therefore, the cargo has not arrived, the plaintiff's claim [*359] to his commissions *has been defeated by an accident insured against, and the policy is forfeited. To know whether the plaintiff is entitled to recover, we must answer this question; has the cargo arrived? For its arrival is the test. The policy is on the cargo, depending on the arrival of the goods. The written memorandum does not affect this position. It is within the principle of *Kemp v. Vigne*, 1 D. & E. 804, and the plaintiff entitled to recover without reference to the contract. By the terms of it there can be no recourse against the owners, for it is to be taken in connexion with the agreement of the plaintiff and his partner to sell the return cargo. His right against them depended on precedent conditions; on his "undertaking and executing the duties of his trust." They were, under the contract, to sell and invest the outward cargo, and from those duties, when performed, resulted a third, the selling of the return cargo. Till these were all discharged, the plaintiff could have no recourse against the owners. Their agreement was entire for a gross specific sum, on fulfilling certain duties. They have already paid commissions in St. Christopher's, and all not to be charged again with a further commission, which they agreed to pay only in consideration of having the return cargo sold free of commission. Are they to pay the consideration for a service, and not have the service done for which the consideration is paid? The advantage to be derived from having the return cargo sold, without a charge for disposing of it, was considered in the amount of what they agreed to allow the plaintiff. The arrival of the cargo from Batavia was contemplated by the owners as a condition precedent to their liability. They looked to profits of the adventure to enable them to pay so large a sum. Of this the plaintiff's right to be paid in goods is a proof. The loss of

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these very goods is an interest covered by the policy. As they are lost, the insurer is liable for their amount:

Hoffman and Harison, contra. The case referred to was on a wager policy, and as this is confessedly one upon interest, the authority cited cannot apply; for, was it a wager policy, a technical total loss would give no right against the underwriter. The analogy as to bottomry does not exist, unless the plaintiff can make out that he is entitled to commissions only on the safe arrival of the cargo. The present claim depends on this question: has the plaintiff a right to commission from his employers? To answer this we must see what are the duties of a supercargo.

To sell, invest, and relade. *Beaver, 48. When [*860] these things were performed, the plaintiff's right accrued; he, therefore, was entitled to his commissions at Batavia, where the last duty was discharged. The payment in New-York, and out of the proceeds, were mere circumstances not of the substance of the agreement, but constituting its modal part.(a) 1 Pow. on Cont. 267. It is urged, however, that the intention of the parties was to make the right to the commissions contingent on the event of safe arrival, because the profits of the adventure were looked to as the fund out of which they were to be paid. Suppose there had been no profits; suppose a loss; or a destruction by fire after arrival; or a bankruptcy of a vendee to whom it was sold; would these have taken away the plaintiff's right? But the cargo has in fact arrived, for the proceeds have come to hand. The destruction of the subject matter has only been a technical one, as between insurer and insured; but as between the plaintiff and his employers it has never ceased to exist. The owners have

(a) Where an antecedent debt exists, place of payment is only circumstance. *Pinchard v. Fowler*, Styles, 416. So where a debt is created by the contract itself, in which the place is appointed. *The Dutch West-India Company v. Jacob Senior Henriques Van Monee*, 1 Stra. 612. *Aliter*, when the debt arises from services at the place. So note the difference.

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had the benefit of the plaintiff's services, and there arises a natural equity out of the case, directing a payment by them for the duties he has performed.

Radcliff, in reply. The arguments against considering the arrival and other circumstances mentioned in the contract as conditions precedent, are founded on principles said to apply to the general rights of a supercargo. The contract was entered into to supersede those rights and create others. The plaintiff, to obtain a large compensation, consented to its being contingent; and to protect himself against that contingency he insured. The authority from Powell speaks of time and place being modal, where there is an antecedent debt, upon which the right of payment is founded; not of a right of payment to arise out of a debt to accrue from time and place, according to an original contract. As to the cases supposed, they are not before the court.

TOMPKINS, J. delivered the opinion of the court. It was conceded on the argument of this cause, that the plaintiff had an insurable interest; and that if, by the agreement between him and the owners of the ship *Mary*, he could not resort to them for the payment of the sum therein stipulated for his compensation, the defendants were liable. Upon the construction, therefore, of that agreement the event of this cause depends.

By the terms of the engagement, as well as by [*361] the contemporary *acts of the parties evincive of their intention, we consider the shipowners discharged from any liability to pay the plaintiff the sum agreed upon for his compensation. Instead of commissions, as they are usually understood, a gross sum is agreed to be paid, for the performance of the duties specified in the contract, and no provision is made for a *pro rata* compensation. The undertaking of W. and S. Robinson to sell the return cargo at New-York, without any allowance

therefor, is a part of the consideration for the payment of the entire sum stipulated to be paid to the plaintiff.

The fund out of which the plaintiff was to be paid is also prescribed by the agreement, viz: "the proceeds of any cargo the ship might bring from Batavia." The arrival of the return cargo, therefore, at New-York, so that the plaintiff might receive his earnings out of its proceeds, or exercise the election given him by the agreement, to receive an equivalent in goods of the return cargo at the current market price, was an event upon which the owners, according to our construction of the agreement, were to become responsible for the ten thousand dollars.

That this must have been the understanding of the parties in this suit appears by the terms of the policy. If it had been intended to insure commissions only, which the plaintiff would have earned upon completing the purchase of the return cargo, there could have been no necessity for insuring home, which is done, and the premium thereby enhanced.

The return cargo did not arrive at New York; and of course, the fund out of which the plaintiff was to be paid failed; and the performance of the duties undertaken by W. and S. Robinson (which we consider a material part of the consideration for the entire compensation to be paid to the plaintiff) has been defeated by a total loss of vessel and cargo. We are therefore of opinion the plaintiff cannot have recourse to the shipowners, and is entitled to recover in this suit.

Judgment for the plaintiff.

Meredith v. Hinsdale.

[*862] *MEREDITH against HINSDALE.

If by the laws and usages of any country, an L. S. in ink be used to instruments instead of seals, such instruments may be declared on in this state as sealed instruments; therefore, debt on a bond will lie in this court, on a Pennsylvania bond, so signed. If the surname in an obligation vary in the spelling, but not much in the sound, from that in the subscription, the obligor may be sued by the name he has signed, without an *alias dictus* as to the name in the deed.

DEBT on a bond executed in Pennsylvania. On production of the instrument, it appeared that, instead of being sealed with wafer or wax, there was an ink seal, or mark in ink, of L. S. in the *locus sigilli*; and that in the body of the deed the obligor was described by the name of Hinsdall, but in the signature it was spelt Hinsdale, by which name he was sued. A verdict having been taken for the plaintiff by consent, with an agreement to enter a nonsuit if the opinion of the court should be against him, the case was submitted to them without argument on these points; 1. Whether an action of debt can be maintained on an instrument not sealed; (a) 2. Whether the defendant ought not to have been sued by the name in the body of the bond?

(a) Debt was brought in the C. B. in England, upon a bond executed in the same manner as that in the text; it was urged that the action could not be maintained, as the declaration was in the usual form of those on bonds, averring it to have been made and sealed by the defendant, and containing the usual *proferri*; without deciding the point, the court recommended the defendant to accede to the terms which the plaintiff had proposed, of taking judgment without costs, and the suit was compromised accordingly. *Adam v. Kerr*, 1 Bos. & Pull. 360. But the principle of *Meredith v. Hinsdale* has been very much shaken by the decision in *Warren v. Lynch*, 5 Johns Rep. 237, in which *assumpsit* was held to be maintainable on a note with an ink seal made in Virginia, though it was in evidence that such notes were there regarded as sealed instruments. A different construction on actions of this sort appears to be entertained in Westminster Hall. On a bond executed in Scotland, by the laws of which country it is assignable, and treated as a *chose in action*, the assignee may bring *assumpsit*. *Innes v. Dunlop*, 8 D. & E. 595.

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Hyelman v. Shotbolt, 8 Dyer, 279, was cited for the defendant. *Innes v. Dunlop*, 8 D. & E. 595, for the plaintiff.

LIVINGSTON, J., delivered the opinion of the court. The principal question is, shall an instrument purporting to be a bond, and in its usual form and terms, delivered also as the maker's deed, not be considered as a specialty, because the L. S. are affixed to his name instead of being sealed with wax or wafer?

However ancient the use of seals, as a mark of authenticity to instruments, may be, or to whatever cause their origin may be ascribed, it is certain that in modern times a private seal is not regarded as evidence of truth, or of belonging to the party to whose signature it is affixed, but that men promiscuously use each other's seals without attention to the impression or coat of arms. Thus, it is no common thing to see a seal, containing the device, arms, and perhaps name, of one person, used to authenticate the instrument of another. If it be not necessary, then, that in sealing a deed, the grantor should affix his own, but may adopt the seal of a stranger, why should it be exacted that the materials on which the impression is made should be of wax, wafer, or of any other particular composition? Why should not any impression or mark answer as well as the common mode of sealing, provided it be durable, whether it be stamped on the paper itself, or on something laid upon it, if it be made as a solemn act of confirmation, and deliberately acknowledged as the seal of the party making it? Why, then, may not ink, the mark of *which will last full as long as any made on wax [*368] or wafers, be used as well as they? But, without giving an opinion on a point not before us, and which might seem to encourage an innovation in the mode of sealing, we all think that this instrument being executed in Pennsylvania, according to the laws(a) and usages of

(a) Which were proved at the trial by the testimony of a counsellor at law residing in Pennsylvania.

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which state, sanctioned by a decision of its supreme court, such form of sealing is as valid to constitute a deed or specialty as if wax or wafer had been applied, it ought to be received as such here, and of course, that an action of debt will lie on it in this court.

On the other point, which regards the *misnomer*, we think there is no essential difference between the name in the bond and the one by which it is subscribed. The variance arises from a little misspelling, which produces scarcely any change in pronunciation. The sound of both names is nearly alike. In the case cited from Dyer, an entire wrong christian name (John for William) was inserted in a bond, which the obligor had signed by his true baptismal name, and by this he was sued, but it was there held that he should have been arrested by the name in the bond, with an *alias dictus* as to the name by which it was executed. This may be good law, but as the reason and common sense of it are not very palpable, and as this is not the case of a wrong christian name, but of a trifling misspelling of a surname, we do not think it presents any obstacle to our giving judgment for the plaintiff.

Judgment for the plaintiff.

JACKSON, *ex dem.* DONALDSON, *against* LUCETT.

The book of the judge of the court of probates, containing the record of the probate of a will, may be given in evidence in ejectment, if it be proved that the original will is lost. Poplope's Kill, and four chains on each side of it, to a pond of water, over the mountains, and four chains round it, are in the grant of Staats patent. The west line of Staats patent is a line twenty chains from the river Hudson, from the northwest course of the patent to the head of the Assinnapainck, not in a straight line, but in such a line as that some part of the river may from every point of the line be within 20 chains, though other parts may be further from it.

EJECTMENT for lands in the county of Orange, claimed by the plaintiff, under the Bear Hill patent, and by the

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defendant under the one to Staats. The facts, as they appeared on the case made, were these:

In 1712, a patent was granted to Samuel Staats and his heirs forever, of a certain tract of land in the county of Orange, "Beginning on the west side of Hudson's river, just against Anthony's Nose, at the mouth of a small rivulet, called by the Indians Assinnapainck, and thence up Hudson's river, as it runs, a northeast course two hundred chains, which is about four chains to the northward of Prince's Falls, thence up into the woods northwest twenty chains, to the *mountain, thence along the [*364] said mountain parallel with Hudson's river, to the head of the said Assinnapainck, thence down the said rivulet, as it runs, to Hudson's river to the place where it first began, together with a small rock isle, and a small piece of boggy meadow, called John Canton Hook, all which together contain four hundred acres, English measure, all rocks and stones, very little timber or firewood, bounded to the south by the widow Courtland or Assinnapainck rivulet, and the pond, west by the mountains, north by land unsurveyed, and east by Hudson's river, together with a small slip of land, four chains broad on each side of a fall of water that falls into a small run of water that comes into Hudson's river, just below the meadow, at the said John Canton Hook, and up against the stream of the said fall of water, over the top of the said mountain, to a pond of water, and round the said pond, keeping still the said breadth of four chains broad."

In 1743, a patent, since called the Bear Hill patent, issued in favor of Richard Bradley, the then attorney-general for "a certain tract or parcel of land, lying and being in the county of Orange, on the west side of Hudson's river, (and within the bounds of the land formerly granted to one Captain John Evans, the patent whereof has since been vacated, and the lands reassumed,) beginning on the north side of a certain brook or creek in the Highlands, called Poplope's Kill, (falling into Hudson's river, opposite

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Anthony's Nose,) where the line of the west bounds of the land there, formerly granted to Samuel Staats, crosses the said brook or creek, and runs thence north twenty-eight degrees east, along the said line four chains, then north fifty-five degrees west forty nine chains, then west thirty-one chains, then south one hundred and seventeen chains, to a certain creek (or run of water) on the west side of a certain meadow called Salisbury meadow, then down along the said creek (or run of water) as it runs to Hudson's river aforesaid, then up along the said river, as it runs, to the said lands granted to Samuel Staats, then along the bounds there of the same lands to the place where this tract first began, containing eight hundred acres besides the usual allowance for highways, in which last-mentioned tract of land all the said Bear Hill, and part of the said Poplope's Kill (or Creek) and part of the lands thereto adjoining, remaining yet unpatented, are included." Bradley, by lease and release, for good consideration, conveyed [*865] to one Roger Tompkins the Bear Hill patent, "saving and excepting all the said Poplope's Kill, or brook, and all the falls of water therein, and all those lands which lie on each side of the said Poplope's Kill or brook, within the distance of four chains and a half from the said kill or brook, all the way the same runs through the above released lands, or any part or parcel thereof." Some time after executing the above conveyance Bradley died, having first duly made and published his will, in which he made no particular mention of the premises, but, after some specific legacies, "devised all the rest and residue of his estate, both real and personal, whatsoever, to his wife, Elizabeth Bradley, with full power and authority to grant and convey the fee-simple thereof." In May, 1760, Elizabeth Bradley, by bargain and sale, reciting the deed from her husband to Tompkins, and the reservation therein, in consideration of five shillings, conveyed *in totidem verbis*, to William Donaldson, the father of the lessor of the plaintiff, the Poplope's Kill and land on each

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side of it, as the same were reserved in the release of Richard Bradley. The patents being admitted, the plaintiff offered, at the trial of the cause, to establish the will of the testator, by the record of the probate in the book of the judge of the court of probates, and showed by evidence that the original will could not be found either in the office of the surrogates of New York or of Albany. An objection to the reception of this testimony was made and overruled. The conveyance to Donaldson was then substantiated, and the plaintiff called a witness who testified, that if a straight line parallel to the Hudson, or northeast course of the Staats patent, was run from the termination of the northwest course to the head of the Assinnapainck, Bradley's grant would include the premises in question, but then the line would cross the Poplope's Kill at only about five chains from the Hudson's river. That John Canton Hook is an island to the north of Prince's Falls, on a meadow of about five acres, which joins the land adjacent to Prince's Falls. That no other lands were known by that name, and that a part of the defendant's improvements, which were in his possession, were more than 20 chains from the Hudson, or the mouth of Poplope's Kill. This the plaintiff insisted was not the run of water mentioned in the Staats patent, and the premises being on the Poplope's Kill, passed by the grant to Bradley, and being reserved in the deed to *Tompkins, were afterwards conveyed to [*366] the father of the lessor of the plaintiff, by Elizabeth Bradley, to whom they were devised by the residuary clause in the will of her husband. The defendant adduced testimony tending to show an adverse possession, which it is unnecessary to detail, and from the evidence of one witness, who said John Canton Hook extended to the mouth of the Poplope's Kill, contended the premises were within the limits of the subsidiary grant in the Staats patent, the run of water there mentioned being the Poplope's Kill, and that the line to be run from the end of the northwest course of the Staats patent, ought to be a line

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parallel to the Hudson, in all its sinuosities, so as to be always twenty chains distant from the river. The judge having charged for the defendant, the jury found a verdict in his favor, and that the Poplope's Kill was the stream contemplated in the Staats patent, by which four chains on each side that stream were granted.

Colden moved to set aside the verdict, as being against evidence. He argued from the impossibility of running the west line of Staats patent exactly parallel to the sinuosities of the Hudson: and, with respect to the propriety of receiving the record of the probate of Bradley's will, he laid down these positions: When an original instrument is not found, where by law it ought to be, it must be presumed to be lost. That slight evidence of the loss of a paper is sufficient. *Livingston v. Rogers*, 1 Caines' Cases in Error, 27. That there is a distinction between the record of the probate, and the probate or letters testamentary, which are no more than a copy of that record. The first is evidence, the second not. See *Doe v. Culvert*, 2 Campb. 389, evidence of the original will being lost, the probate held inadmissible to prove its contents. 1 Gilb. Law Ev. by Loft, 70; Pow. on Dev. 706; Skin. 174; 1 Ld. Raym. 731.

Smith, contra, insisted that the proof of the loss of the original will was not sufficient, and that the west line of the Staats patent must be nowhere less than 20 chains from the Hudson. The plaintiff's construction is, therefore, erroneous, and the verdict of the jury conclusive.

SPENCER, J. delivered the opinion of the court. In our view of this case, it is unnecessary to enter into minute consideration of the evidence as to the adverse possession of the defendant, or the situation of John Canton Hook, or the probabilities whether Prince's Falls or Poplope's Kill were intended by the subsidiary grant in the Staats patent. The premises in question lie on Poplope's Kill, and

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it appears to us the plaintiff failed *in the out- [*367] set, in locating the premises within the patent to Bradley. The will we consider as properly in evidence. The facts proved were sufficient to induce a presumption of the loss of the original, and on the authority of the case of *Livingston v. Rogers*, decided in the court for the correction of errors, when evidence sufficient to induce the presumption of a loss of a deed is exhibited, either parol proof may be given of the contents, or a copy may be received. We are satisfied, therefore, as to the plaintiff's deduction of title, and shall rest our opinion solely on his locating that title. Staats patent is the anterior one, and must be first satisfied. It begins at the mouth of the Assinnapainck, and then runs up the river, as it runs, four chains to the north of Prince's Falls, then into the woods northwest twenty chains to the mountains, then along the said mountains parallel with the river to the head of the Assinnapainck, then down the same to the place of beginning. The plaintiff's surveyor, to ascertain this tract, ran a straight line from the termination of the twenty chains mentioned in Staat's second course, to the head of the Assinnapainck, disregarding the expressions in the patent, which required him to consider the twenty chains as terminated at the mountains, and to run along the mountains, and parallel with the river. It is in vain that the plaintiff proved that some part of the defendant's possessions were more than twenty chains from the river, because the distance of chains is to be rejected where an object is pointed out, and because too in running lines parallel with a river it is only requisite that the distance, where that is to control, should be such that the river in some one point is not further off than is required.(a) In other words, the west line of Staats patent, without reference to the mountains, if run parallel with the general course of the river, might,

(a) *Ante*, 177. The same principle adopted in the location of the Hosiok patent. *Jackson, ex dem. Quackenbush, v. Dennis*.

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in some places, be at a greater distance than the twenty chains, and still be correctly run. In our opinion, therefore, the plaintiff wholly failed in showing himself entitled to any part of the lands in the defendant's possession. As to the fact whether the Poplope's Kill was the run of water intended in the second tract granted to Staats, it was a question fairly submitted to the jury, and the court can see no reason for disturbing their verdict in that respect. On the whole, we are clearly of opinion that on no principle is the plaintiff entitled to a new trial. He, therefore takes nothing by his motion.

New trial refused.

[*368] *JACKSON, *ex dem.* JACKWAY AND RUSSELL,
against STILES; WILLIAMS, tenant.

If a person be admitted defendant in ejectment, and keep out of the way to avoid service of the *ca. sa.* against the casual ejector, the court will grant a rule to show cause why an attachment should not issue, of which service at the house of the defendant will be sufficient.

It was ruled, that if a person be admitted to defend on payment of costs, and, after entering into the consent rule, keep out of the way to avoid being served with a copy of the *ca. sa.* against the casual ejector, a rule will be granted to show cause why an attachment should not go against him, and that service of that rule at the defendant's house shall be sufficient.

Kane v. Scofield.

KANE AND KANE *against* SCOFIELD.

IF the endorsement of a firm be stated in a declaration on a bill, or note to be made to them, as persons "using the name, style, and firm," endorsed, and that they "endorsed the said note, the proper handwriting of one of them, in their said copartnership name, style, and firm, being to such endorsement subscribed," it is good on general demurrer. To prevent a demurrer's being overruled as frivolous, there must appear a color for opposition; it is not enough for counsel to merely say he will oppose. When a reason for not noticing for the first day of term appears on the face of the record, there need not be any excuse shown by affidavit.

THE declaration in this case stated the endorsement of a promissory note to a firm whose surnames only had been used, in the following manner: "to certain persons using the name, style, and firm of Willoughby & Weston," and it afterwards stated their endorsement to the plaintiffs thus: "And the said persons so using the name, style, and firm of Willoughby & Weston endorsed the said note, the proper handwriting of one of them, in their said copartnership name, style, and firm, being to such endorsement subscribed." To this the defendant put in a general demurrer.

Hopkins, on a notice of motion for the 11th, moved to overrule it as frivolous, and claimed on that account a priority to other causes entered for argument.

Quines, contra, insisted, that the right of bringing on a demurrer, in preference to other causes set down for argument, applied only to cases where no opposition was made. *M' Cabe v. M' Kay*, ante, 100, in August, last. That at all events the notice was bad, being for the 11th instead of the first day of term.

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Hopkins, in reply. The demurrer book was not made up till the first day;(a) the caption is of this term.

Per Curiam. By the opposition of the case cited, is not intended the mere saying of counsel that they [*369] oppose; it must *be such as has at least a color or resemblance of reality. The notice could not be for the first day. It appears by the record that it was not till then that there was a joinder in demurrer.

Judgment for the plaintiff.

N. B.—It was ruled in this case, that where the reason of not noticing for the first day of term appears on the face of the record, no affidavit in excuse need be made.

FURMAN against HASKIN.

A promissory note, payable on demand, if negotiated by the payee a long time after made, is, in the hands of his endorsee, subject to all the equities to which it would have been liable in the hands of the payee himself. What shall be a reasonable time for demanding payment of a note payable on demand, is, when the facts are agreed on, matter of law. If a debtor, for the benefit of all creditors, give to trustees a bond to the amount of all his debts, on which judgment is recovered, and he afterwards give a note to an individual creditor for the amount of his separate debt, such note will be satisfied by such creditor's discharging the debtor from execution on the judgment issued at the request of the creditor, and the assent of the trustees to the discharge will be implied. A plea in bar, admitting the note declared on, cannot depart from the *verba* in the declaration, and need not therefore give one. In all cases of demurrer, if it be not a frivolous one, the court will, even after judgment pronounced, give leave to withdraw it, and plead issuably, if asked for during the term in which judgment was given.

ON DEMURRER. The plaintiff declared against the defendant, as maker of a promissory note, dated on the 19th

(a) The time at which a question on demurrer shall be deemed to arise, shall be the day the joinder was received by the party demurring. 3d Rule, Jan. 1799. Colo. Ca. 14.

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of July, 1793, payable on demand to William Buckle or order, and by him, on the same day, endorsed to the plaintiff. To this the defendant pleaded, 1st. *Non assumpsit*, 2d. The statute of limitations; 3d. That he was, on the first day of January, 1793, indebted to Buckle in the sum for which the note was made, and on that day executed a bond to Anthony Franklin, Joseph Bird, and Edmund Prior, for £9,000 for and on account of the money due to Buckle, and of all other debts which he, the defendant, owed; upon which bond the obligees, in April term, 1793, recovered judgment against him, averring that the note was made and delivered to Buckle, for the same sum of money as was due to him on the first of January, 1793, as aforesaid, that the judgment exceeded the amount of everything owed by the defendant, that the above sum due to Buckle was part of the £9,000, for which debt Buckle did, on the first of August, 1793, accept the judgment in full satisfaction, and on the next day caused a *ca. sa.* to be sued out thereon, upon which the defendant was taken, and was afterwards, on the first of January, 1795, by consent of Buckle, discharged therefrom, since which time he negotiated the note to the plaintiff.

Demurrer *inde*, assigning for causes, 1st. That the defendant did not allege that the bond of the first of January, 1793, was given and executed at the request or by the consent of Buckle, nor that it was agreed between them that the bond should cancel the debt due from the defendant to Buckle; 2d. That it did not appear that the bond was executed to Franklin, Bird, and Prior, as trustees for the creditors of the defendant generally, or for Buckle in particular; 3d. That it appeared the note was made after the execution of the bond and judgment entered thereon; 4th. That the note being negotiated, and negotiated to the plaintiff, cannot be defeated, *or controlled [*370] by any agreement between the defendant and Buckle; 5th. That the judgment was alleged to have exceeded the whole amount of the debts owing by the de-

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fendant, but it is not alleged that the sum inserted in the condition of the bond exceeded the same; 6th. That the plea is uncertain, argumentative, not issuable, and wants form.

Harison, in support of the demurrer. Though the whole plea is defective and informal, I shall confine myself to that alone which is matter of substance. The declaration states a note payable on demand. The plea sets forth certain transactions and dates, "since which time" the note was negotiated. As between the maker and payee, these things might be material, but against an innocent endorsee, for a valuable consideration, they can have no effect. The note is of a nature which cannot be supposed to be dishonored after any lapse of time short of the statute of limitations. There is no period fixed by law for the presentment of notes payable on demand. When left with the payee, after the circumstances relied on by the defendant, it enabled the holder to pass it away in the course of business, and if so done, it is good against the maker. The cases to the contrary arise on notes payable after date, and if negotiated beyond the period when due, the law allows a presumption that they have been dishonored. But there is nothing on this instrument to show any such time had passed. Therefore, on this plea, the court cannot decide what is a reasonable time for the negotiation of this note. It is a fact which ought, under the direction of the court, to have been submitted for the determination of the jury. The custom is, to consider these notes binding till demanded. Admitting, therefore, that the taking in execution and subsequent discharge would have been a satisfaction of the note, as between Buckle and Haskin, the point to be tried is, when, was it negotiated? Was it within a reasonable period? This was the fact that ought to have been laid before the court with all the circumstances which would have made it triable. Time and place ought to have been shown. The latter, because there ought to be a place

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from whence the venue would arise. 6 Mod. 222; 3 Salk. 881. The plea consequently is bad altogether. It may be said that the venue laid in the declaration cannot be departed from. This, however, does not supersede the necessity of laying a venue, though it be the same. This being a defect in substance is available of, though not specially assigned.

Riker, contra. The special causes are not true; [*371] therefore, the whole turns on the general demurrer.

We contend, 1. That the acceptance of a bond or higher security merges and extinguishes a note; 2. That the discharge of the defendant from execution, by the consent of Buckle, satisfied the judgment; 3. That the maker of a promissory note payable on demand, having satisfied it, may urge that satisfaction against a holder taking it long after made; in short, that on this point there is no difference between a note payable on demand, and one payable after date. On the first point, *Roades v. Barnes*, 1 Burr. 9.

KENT, Ch. J. Go to your third point.

Riker. In *Banks v. Colwell*, cited 1 D. & E., Buller, J. in an action by the holder against the maker of a promissory note, endorsed eighteen months after it was made, allowed the defendant to show the consideration was illegal, and nonsuited the plaintiff, though no privity was brought home to him. This is because a person thus taking a note receives it subject to all the equities the maker may be entitled to. This principle is acknowledged, in *Chitty*, 114, to be applicable equally to cheeks and bills payable on demand. Lord Kenyon, in *Boehm v. Sterling*, 7 D. & E. 480, admits he once thought there was a distinction, in this respect, between paper payable on demand, and that which is so after date; but, he adds, "on further consideration, I do not think that distinction well founded." In

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Haskin v. Seaman, (since reported 2 Johns. Cas. 195) January, 1801, this court recognized the same doctrine. The only difference between the cases is, that the one cited was on a sealed note. As to the *venue* the exception cannot hold.

Harison, in reply. Where the instrument is payable on demand, the negotiation must be attended with suspicious circumstances, even though the transfer be long after the date, in order to allow of any equities against the holder. If the paper be payable after date, the time for which drawn being expired is in itself a cause for suspicion. It is from thence to be presumed the bill or note has been dishonored. When the payment is on demand, this implication cannot arise on the face of the instrument, and circumstances, therefore, must be called in. In the case before Buller, J., which was only a *nisi prius* decision, the judge told the jury they ought, from the evidence, to presume against the plaintiff. (Buller, J. nonsuited him.) With the distinctions now laid down all the English authorities will be reconciled. Had there been a verdict, then indeed the objection as to the want of a *venue* [*372] *would not hold. But as this is a case of demurrer, it is not helped by the statute of jeofails, and must be fatal against the defendant.

KENT, Ch. J. delivered the opinion of the court. The two objections to this plea, which require consideration, are, 1. That the plaintiff being an innocent endorsee without notice, is not affected by the transactions which took place between Buckle and the defendant; 2. That there is no *venue* in that part of the plea, alleging the time when the note was negotiated. As to the first, it is a general rule, that a note payable on demand must be presented for payment within a reasonable time, or it will be considered as a note out of time, and dishonored. Chitty, 114, 146.(a)

(a) What shall be a reasonable time depends on the circumstances of the

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What is a reasonable time is a question of law, if the facts be agreed on. *Tindal v. Brown*, 1 D. & E. 168. In the present case we are to assume it as a fact, that the note was not negotiated to the plaintiff until after the first of January, 1795; or near eighteen months from the period when it was given. This fact is averred in the plea, and of course admitted by the demurrer. This lapse of time must clearly be considered as placing the note in the situation of one due, and dishonored, and as imposing on the endorsee the same risk. No person of common prudence will take such a note without inquiry concerning the occasion of its being so long outstanding, and it is incumbent on him to satisfy himself that it is good. He takes it on the credit of the person from whom he receives it. The case of *Banks v. Colwell*, cited in 3 D. & E., is in point. The judge in that case allowed the maker to impeach the consideration as being a note negotiated after it was due, and sufficiently suspicious to throw the risk on the endorsee. This decision of Buller, J. was cited and sanctioned by the court of K. B. in the case of *Brown v. Davies*, 3 D. & E. 80. If the defendant here be allowed to set up the same defence as he would have done if Buckle was the defendant, the facts stated in the plea constitute a valid defence. They are embraced by the decision of this court, in the case of *Seaman v. Haskin*, January term, 1801, in which a plea, containing the same facts in substance was held good. It was there determined, that as a *cestuy que trust*, had affirmed the trust, accepted the judgment in satisfaction of his debt, and exercised the power of it by charg-

case. Where a note payable on demand to order was made in England, and the maker removed to this state, it was held that a transfer and action brought within a year was not such a lapse of time as place the instrument in the situation of a dishonored note. *Hendricks v. Judah*, 1 Johns. Rep. 819. But where a note was drawn in this state payable to bearer on demand, and negotiated two months and a half after its date, the period was ruled sufficient to let in the equities of the maker against the payee, as a defence in an action by the endorsee. *Loose v. Dunkin*, 7 Johns. Rep. 70.

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ing the defendant in execution, and afterwards discharging him, the assent of the trustees was to be intended. [*378] On the second point, that the want *of a *venue* in that part of the plea which avers the time of the endorsement, is a defect in substance, and bad on demurrer, without being specially assigned, we are of opinion it is, in the present case, but matter of form; because the plea cannot vary from the place in the declaration, when the nature of the defence does not otherwise require it. 3 Lev. 113; Com. Dig. tit. Pleader, E. 4. As the defendant must, therefore, have followed the *venue* of the plaintiff, it appears to me it can only be matter of form, and is not essential to the right of the case, on which depends the distinction between matter of form and matter of substance. Hob. 233. Judgment ought, therefore, to be for the defendant.

Harrison. We have, then, to ask leave of the court to withdraw the demurrer and take issue on the fact.

KENT, Ch. J. Take it; for it is allowable in all cases where the demurrer is not frivolous, if applied for in the same term.

Judgment for the defendant, with leave to withdraw the demurrer and plead issuably.

POMROY against PRESTON.

This court will, on motion, order a writ directing the judges of the common pleas to come in and acknowledge their seals to a bill of exceptions

IN error on a bill of exceptions from the common pleas. The plaintiff had not assigned errors, and after the return of a *scire facias quare executionem non*, moved for leave to

 Van Doren v. Welker.

take out a writ, ordering the judges of the court below to come in and confess or deny their seal, and that in the meantime all proceedings by the defendant should be stayed. Ordered accordingly, and that the judges appear at the City Hall of the city of New York, on the first day of next term.(a)

 VAN DOREN *against* WALKER.

If it appear from a return to a *certiorari* that the jury retired, and nothing is said about a constable's being sworn to attend them, it is a fatal omission, not to be supplied by intendment.

IN ERROR on *certiorari*.

Cady, for the plaintiff. The return does not state that any constable was sworn to attend the jury, though it is evident they retired.

Van Vechten, contra. As no improper practice is alleged, *and it does not appear a constable was [*374] not sworn, the court will intend it was done.

Per Curiam. As nothing is said about a constable's being sworn, or having charge of the jury, the court cannot supply it by intendment. There are no words in the return to intend by. We might as well intend an issue joined, or a *venire* when nothing is stated. The justice must state, as the writ requires him, all his proceedings, the whole history of the suit. When a proceeding so essential is omitted, we cannot consider it as done.

Judgment reversed.

(a) See vol. 1, 571, *The People v. Judges of C. B. for Washington County*.

Low v. Hallett.

LOW against HALLETT.

In an action for use and occupation, the court will change the *venue* to the county where the house is, if all the defendant's witnesses reside there and the plaintiff do not show he has any, as the action is founded on privity of contract, and is transitory in its nature.

ON a motion to change the *venue* from New York to Ontario, in an action for use and occupation, the defendant swore all his witnesses resided in the latter county, where the house was situated.

Hoffman resisted it because the action was transitory, and on an affidavit by the plaintiff, stating his case to rest on written receipts, and an agreement executed in New York.

Per Curiam. Take the effect of your application. The papers may be more easily transferred to Ontario, than the witnesses carried to New York. The plaintiff does not show he has a single witness where his *venue* is laid, and the action being founded in privity of contract, not of estate, is of course transitory.

Motion granted.

SPENCER against HULBERT.

In a transitory action the defendant is entitled to change the *venue* to where his witnesses reside, unless the plaintiff show he has witnesses elsewhere.

SIMONDS moved to change the *venue* to Onondaga, on affidavit by the defendant, that witnesses, which his counsel advised were material for him, resided there.

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Williams, contra. The action is for goods sold and delivered in Hudson, where the plaintiff lives.

Per Curiam. Here is special matter in addition to the common affidavit, and in such a case, unless the plaintiff will, by affidavit, state that he has one or more witnesses residing elsewhere than in the county where the *venue* is moved for, the court will order it to be changed. It is just and reasonable, where the plaintiff has no witnesses out of the county where the *venue* is moved for, that we should grant the application *even though the [*375] action be goods sold and delivered, or other transitory matter.

Venue changed.

WILBER against DAY.

In error on *certiorari*, the costs of only the general assignment to be allowed. If the error be from a clerical mistake in transcribing, and it be assigned for error, but the defendant do not apply to amend till after argument, it will not be allowed without payment of costs.(a)

SIMONDS, for the plaintiff. A rule was last term ordered to show cause against the amendment allowed in August last. Ante, p. 189. But on search no rule has been entered; am I, then, to show cause against what does not exist?

Per Curiam. We remember that a rule was granted, and you yourself cannot have forgotten it. Cause, therefore, must be shown.

Simonds. By the decision of August, the court pro-

(a) See ante, 116, n. (a)

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nounced the error for which they reversed the judgment to be matter of substance. The determination, then, has been on the merits, and, therefore, neither by the statute, nor the common law, can an amendment be allowed. *Woodman v. Inwen*, Barnes, 9; *Saunders v. Lenox*, 8 Salk. 81, is in point. In error from the court of Northampton, the record removed was *præceptum fuit* instead of *præceptum est* in the *venire*, and *messes* instead of *misis*. The draft below was right, but as it was only a private paper, the court refused to amend the record by the draft, though it was, as in the present case, sworn to be right below. *Philips v. Huish*, Cro. Jac. 13, shows that misprision in substance is not amendable. If, however, it be ruled otherwise, then all costs must be allowed. *Foster v. Blackwell*, Barnes, 7

Gold, contra. The courts have in modern days been very liberal in amendments, and have allowed them after argument and judgment on the point agitated. *Tippet v. May*, 1 Bos. & Pull. 411; *Griffiths v. Eyles*, *ibid.* 418; *De Symonds v. Shedden*, 2 Bos. & Pull. 153; *Morris v. Langdale*, *ibid.* 284; *Brigden v. Parkes*, *ibid.* 424; *Sharp v. Stacey*, Barnes, 5; *Mayo v. Archer*, 1 Stra. 513; even in case of a special verdict. *Smith v. Fuller*, 2 Stra. 786. Wherever there is any thing to amend by, the court will permit the amendment asked. *Green v. Rennet*, 1 D. & E. 782. Its allowance is in the discretion of the court. This is a proper case, for the assignment is in a matter known to be untrue; not arising on the facts, but on transcribing the record, and after *certiorari* brought. It appears, therefore, that [*376] when it was sued out *there was no actual error.

The favor of the court will not surely be denied in a case originally right; which continued so when the plaintiff took his exceptions, and is become otherwise only by an *ex post facto* circumstance, never relied on, nor even contemplated by him.

KENT, Ch. J. What do you say as to the costs why they should not be paid up to this day? The amendment

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Annorly ordered said nothing as to them. You have made an incorrect return. Your excuse is that it was a mistake. Is this a reason for not paying costs up to this time? Suppose the question had arisen in August term.

Gold. I readily agree that amendments are generally on payment of costs. But circumstances create exceptions. In *Cromwell v. Grumdsen*, 1 Ld. Raym. 885, the formal conclusion of a special verdict was rectified without costs. Where justice and equity is against the party wishing to avail himself of an error, costs are remitted. Therefore, where to a sham plea the plaintiff filed a bad replication, an amendment, without costs, was allowed after demurrer argued. *Solomons v. Lyon*, 1 East, 869. It was done in *De Symonds v. Shedden*, 2 Bos. & Pull. 153, and *Bell v. De Costa*, *ibid.* 446, though no such special reason existed. The only(a) reason why costs are given, is on a supposition that there was error when the writ was sued out. *Wilkinson v. Meyer*, 8 Mod. 232. As that was not the case costs ought not to be allowed.

Simonds, in reply. The whole reliance as to being excused costs, is on the defendant's having made a correct draft. Suppose a correct plea drawn, and an insufficient one filed, would it prevent costs on a demurrer, that the defendant's counsel had a good draft at home? He ought to look at what is on file. Besides, the record shows this error was assigned twelve months before the case was argued. Why did not the defendant then move to amend? If the inattention of the defendant give occasion for error,

(a) By the common law amendments were allowed; but then the party was to pay a fine for leave to amend, (like a fine *pro licentia concordandi*;) an amercement being due to the king for ill pleading. By the statute of Maribridge it was enacted, that, *de cetero fines non capiantur pro pulchre placitando*; that is, for leave to amend vitious pleading; as therefore the statute took away the fine, but the grievance was still the same to the opposite side, which before, on the principle of *nemo bis, pro eodem delicto, puniri debet*, received no compensation, it was held but reasonable to give costs when the offence would otherwise go unpunished.

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it can be rectified only at his expense. In *Rees v. Morgan*, 3 D. & E. 349, the defendant in replevin, after a verdict for him, and damages to the amount of the rent claimed in his cognizance, neglected to have found either the amount of the rent in arrear, or the value of the cattle distrained; this, as being the inevitable consequence of the verdict, was permitted to be amended by entering a judgment *pro retorno habendo*. The court, however, ordered it on payment of costs. Such, it is presumed, must be the decision here.

[*377] **Per Curiam.* We think the justice ought to have leave to amend his return, in respect of the oath administered to the constable who had charge of the jury. This, however, though on payment of costs, must be of those on the general assignment of errors only, (a) and of the costs subsequent to that assignment, down to the giving of the opinion of the court in August last. In making up the paper books, therefore, costs on the general assignment of errors are to be allowed, rejecting the long list of the other errors assigned. But as the defendant has given occasion for this application, the plaintiff may discontinue without costs; neither party to have any costs against the other on the motions to amend. (b)

Rule absolute.

 BRANDT, *ex dem.* WALTON, *against* OGDEN

Priority of argument.

It was ruled in this cause that if a public officer inform the court, that the situation of a county is such as to re-

(a) This was afterwards taxed by Kent, C. J., at 4 folio.

(b) That, it is presumed, means since August.

Brevort v. Sayre.—Anonymous.

quire, for the sake of the peace of the people, a decision on the point contained in a case, it will take preference of all others on the calendar.

BREVORT *against* SAYRE AND HURD.

If an inquest be taken while the parties are endeavoring to compromise, in consequence of a meeting appointed for that purpose, it will be set aside.

BOYD moved to set aside the inquest taken in this cause, on an affidavit, stating that the day on which the cause was set down for trial, one of the defendants, who was merely a surety for the other, sent a message to the plaintiff, by which he requested a meeting, to settle the suit if possible, in consequence of which an appointment was made for the evening, in order to try to compromise, but during the course of the day the inquest was taken.

Per Curiam. Take your motion.

Inquest set aside.

ANONYMOUS.

Motion on a frivolous plea like that on a frivolous demurrer.

It was ruled that a motion to overrule a frivolous plea, and be at liberty to enter a default as if no plea had been filed, has the same preference as motions on frivolous demurrers.

Steinbach v. Ogden.—Mayor of New York v. Sands.

[*378] *STEINBACH *against* OGDEN.

A case is not ready for argument if the points be not in writing, and if only orally stated, the court will not suffer it to be brought on.

IN the case made, the points relied on were not specified, but merely stated by the opening counsel.

Per Curiam. You are not entitled to bring on the argument. The points should have been reduced to writing, and this not merely for the benefit of the court, but of all parties.

THE MAYOR AND CORPORATION OF NEW-YORK *against*
SANDS.

If a defendant petition the mayor and corporation of New York, for relief in a suit by them on a penal ordinance, during the pendency of which a default and judgment thereon be entered, they will be set aside, especially if any thing like merits appear.

PENDLETON moved to set aside a default and judgment obtained on a penal ordinance by the corporation of the city of New-York, directing the defendant, as owner of certain vacant lots, to fill them up. The affidavit read denied his being owner. It also set forth that the defendant had, on that ground, applied by petition to be relieved, but before any answer was given, and whilst the application was pending, the default and judgment were entered.

Harrison contended that as the proceedings were regular, the petition ought not to have the effect of suspending them. The fact relied on, as an excuse, was a legal defence, and might have been pleaded if true.

 Patrick v. Hallett.

Per Curiam. The proceedings complained of took place while a petition was pending, and there is, therefore, something of surprise. In addition to this, there are in effect merits disclosed. Let the default and judgment be set aside.

Motion granted.

 PATRICK against HALLETT AND BOWNE.

There may be judgment as in case of nonsuit for not proceeding to a second trial. A misapprehension of the practice on a point not settled will excuse from the usual costs on stipulating.

MOTION for judgment as in the case of nonsuit for not going to trial.

Riggs, resisted, because the cause had been once tried, and our act, (1 Rev. Laws, 353,) being like that of the English, required the same construction, under which it was held a plaintiff could not be nonsuited for not trying a second time. If we are wrong we are ready to stipulate.

Per Curiam. We have no doubt of the power of the court to nonsuit on a second trial. A plaintiff who has once tried *his cause, after which the verdict is set aside and a new trial awarded, is bound to try again, and again, if necessary; and if he did not, the defendant may apply for a nonsuit. But the English practice has misled, and our own has not been perfectly settled, the plaintiff may stipulate and without costs.

Motion denied on stipulating and costs.

Rogers v. Garrison.—Ekhart v. Dearman.

ROGERS *against* GARRISON.

Though a cause has been on the day docket in New York, yet the non attendance of counsel to try it may, under circumstances, be an excuse for not allowing judgment, as in case of nonsuit.

THIS cause had at last New-York sittings been set down for trial on the day docket, but from some little confusion, as to the suits that would be heard before the respective judges, who separately at different times presided, the counsel did not attend. A motion was made for judgment as in case of nonsuit.

Per Curiam. Stipulate(a) and pay costs.

LIVINGSTON, J. I dissent from this, because the only use of a day docket is to enable the bar to know what cause will come on, and it then becomes their duty to attend. If we allow of excuses of this sort, the force of the rule, in the city of New-York, by which day dockets have been established will be totally done away.

On stipulating and paying costs motion denied.

EKHART *against* DEARMAN.(b)

If a defendant, before his time to plead be out, give notice of motion to change the *venue*, without obtaining an order to enlarge the time to plead, or stay proceedings, and the plaintiff for want thereof, enter a default, and go on to execute his writ of inquiry, he is regular; but if he do not intend to oppose the motion, he waives his own regularity and the irregularity of the defendant, and the court will set aside the default and subsequent proceedings.

OSTRANDER moved to set aside the default and all subse-

(a) See *ante*, vol. 1, p. 7, n.(1.) 112, n.(1.)

(b) See vol. 1, p. 2, marginal n.

Palmer v. Mulligan.

quent proceedings on the following facts: On the 2d of October the declaration was served on an agent. On the 11th, the defendant gave notice of a motion, to be made the 12th of November, for leave to change the venue, but on the 10th the plaintiff entered a default, and never appeared on the 12th to oppose the application, in consequence of which the venue was changed as of course.

Per Curiam. The defendant's conduct has not been perfectly regular. He ought, according to the rules of practice, to have obtained a judge's order to enlarge the time to plead, or a certificate to stay proceedings. But though there was an irregularity in the defendant, and the plaintiff was correct in entering the default, he has waived both by silently acquiescing *in the event of a [*380] motion which he knew must be successful. By not appearing his language is, I consent to the application. If so, he certainly agrees to relinquish the default, and every other advantage.

Motion granted.

PALMER and others *against* MULLIGAN and others.

No motion can be made in a second term for costs, to which a party moving was entitled in a former.

THE court ruled that if a party neglect applying in a former term, for all the costs he was entitled to on his then motion, he waives those for which he does not ask, and cannot, in future term, make them the ground of a subsequent motion.

Manhattan Co. Lydig.—Shawe v. Wilmerden.

MANHATTAN COMPANY *against* LYDIG.

It is good ground of opposition to a motion for a struck jury, that the affidavit on which it is made, does not show wherein it is intricate or important. But if no opposition be made, it is then confessed.

HOFFMAN moved for a struck jury, on an affidavit stating the case to be intricate and important.

Jones contended that it was defective in not showing wherein the importance or intricacy consisted.

Per Curiam. In all these cases the court ought to see, from the facts laid before them, that the cause is either intricate or important, and not submit themselves to the opinion of the attorney. We want something beyond his mere affidavit. The words of the statute require this. If, indeed, there be no opposition, then the motion passes, as in other cases, of course; because the opposite party by his conduct confesses these requisites.

Motion denied.

SHAWE *against* WILMERDEN.

If a defendant, after pleading the general issue, obtain his discharge under the insolvent law, and his attorney, by mistake, serve a notice of giving it in evidence at the trial, the court will in a stale cause give leave, on payment of costs, to strike out the notice and plead the special matter, as a plea *pro darrein continuance*, but then the plaintiff will be at liberty to discontinue without costs.

AFTER pleading the general issue, the defendant obtained his discharge under the insolvent law. His then attorney, who had long since declined business, gave notice that he would give this special matter in evidence.

 Manhattan Company v. Brower.

The action being now again proceeded in, application was made for leave to strike out the notice, and plead the discharge, as the mistake of the attorney formerly employed was the reason why it was not before done.

Harison, contra. The known rule is, that an insolvent must plead his discharge. In the present case it ought to *have been *puis darrein continuance*. It [*381] is a defence *stricti juris*, and not to be favored.

Per Curiam. Let the defendant, on payment of costs, have leave to withdraw his notice and plead the special matter; the plaintiff to be at liberty to discontinue without costs.

Motion granted.(a).

 MANHATTAN COMPANY against BROWER.

That a cause was not on the day docket for the sittings in New York, is matter of excuse on a motion for judgment as in case of nonsuit, and must come from the plaintiff on affidavit.

HOFFMAN objected, on a motion for judgment as in case of nonsuit for not proceeding to trial at the New York sittings according to notice, that the affidavit did not state the cause to have been on the day docket. This he contended ought always to be shown, because unless so placed it could not come on, and the plaintiff, therefore, could not be in default.

(a) The rule is, that where a defendant, before judgment, shows to the court that he has obtained his discharge under an insolvent law, he will, though by strict practice too late in his application, be permitted to plead it, on paying costs. *Broome v. Beardsley*, 3 Caines' Rep. 172; *President and Directors of the Merchants' Bank v. Moore*, 2 Johns. Rep. 294; see *Lacey & Briggs v. McDonald*, 1 Caines' Rep. 117, n. (a).

Smith v. Cheetham.—Koy v. Clough.

Per Curiam. Its not being on the day docket is matter of excuse, to come from the plaintiff, and appear by affidavit.

Motion granted.

SMITH *against* CHEETHAM.

Motion for irregularity in a jury, is a non-enumerated motion.

It was ruled in this cause that an application to set aside a verdict for irregular conduct in a jury, is a non-enumerated motion.

KOY *against* CLOUGH.

If an attorney from sudden indisposition, cannot attend the execution of a writ of inquiry, the court will, on terms, set it aside, especially if the damages be excessive.

THE attorney in this cause, from a sudden and dangerous illness, (see *Jackson v. Brown*, vol. 1, 152. S. P. as to trial at circuit,) was unable to attend the execution of the writ of inquiry, in consequence of which the plaintiff's attorney was requested to postpone the execution of it, but he refusing to do this, went on and executed the writ, upon which pretty smart damages were given. Application was now made to set aside the inquisition.

Per Curiam. The inability of the defendant's attorney to attend the execution of the writ, and the defendant himself having no notice of the day, are reasons for setting aside the inquisition, especially as the damages are rather

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excessive. But as the defendant's default is, in some degree, a confession of the plaintiff's right, the rule can be only on the defendant's consenting that the judgment on the inquisition shall be entered as of this term.

Motion granted.

*JACKSON, *ex dem.* F. and E. GOOSE and BROWN, [*382]
against DEMAREST.

After a lessee has quitted the premises demised, without proof of ever having paid rent, and after a 14 years' possession, under conveyances from a lessor who had a right to enter in default of payment, a demand and re-entry will be presumed.

EJECTMENT for lands in Montgomery, in which a verdict was taken for the plaintiff, subject to the opinion of the court on the following case :

In, April 1773, Jelles Fonda demised to Frederick Goose, and Elizabeth, his wife, and their heirs forever, the premises in question, rent free for the first eight years, reserving from thenceforth forever thereafter, an annual rent of six pounds, with a power of re-entry in case the same should be unpaid for twenty-one days after due.

Under this lease Goose and his wife entered, and continued in possession till 1778, when they went into Canada, leaving the premises vacant.

In March, 1785, Fonda, by lease and release, conveyed a large tract of land, including that in dispute, to Daniel Campbell, who, in 1789, demised it to Robert Kason, under whom the defendant claimed.

At the trial there was no proof that Goose had ever paid any rent, or that any person had ever been in possession under him after he went to Canada ; nor was there any testimony that Fonda, or Campbell, had ever demanded the rent, or made any entry for non-payment of it.

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Cady, for the plaintiff. We have to contend that there was no abandonment of the possession, and that the non-payment of rent could not of itself work a forfeiture of the lease.(a) On the first point the case is conclusive. It does not appear that the lessor of the plaintiff ever quitted the possession so as to leave it vacant. But if he did, an entry by the lessor ought to be shown before he could pass any title to a third person. 1 Dyer, 7, a. The breach of the condition gave only a right to re-enter. *Chickley's Case*, *ibid.* 79, a. But even this could not be exercised without a previous demand of the rent, notwithstanding the clause reserving the rent does not specify that any demand is to be made. *Browning v. Boston*, Plow. 130. *Mallory's Case*, 5 Rep. 111. *Molineux v. Molineux*, Cro. Jac. 145. *Newdigate's Case*, 1 Dyer, 68, b. None is shown to have been made, and therefore Fonda had no authority to convey.

Van Vechten and Radcliff, contra. After a lapse [383] of so many *years, a demand must be presumed, as the possession has been in conformity to the title of the defendants. *Read v. Brookman*, 8 D. & E. 159, and the cases cited there. *Vandyck v. Vanbeuren & Vauxburg*, 1 Caines' Rep. 84. *Denn v. Barnard*, Cowp. 595. In *Jackson, ex dem. Smith, v. Wilson*, in this court, to support the title of a landlord who had acquired the possession, after a judgment against his tenant, an affidavit of an insufficiency of distress and a writ of possession were presumed, and that he had entered according to his right under the judgment. So in *Bergen v. Bennett*, 1 Caines' Cases in Error, after 16 years' possession, it was presumed that the proceedings under the act concerning mortgages were regular.

(a) There was a further point made, as to adverse holding; but as it was not noticed by the court, it is not necessary to specify it, or detail the arguments used.

 Knapp v. Onderdonk.

Cady and *Emott*, in reply. It is conceded this case does not rest on fact, but on presumptions; and to warrant them, there must be a string of presumptions. Had there been a demand of rent, there might have been a presumption of an entry: for presumptions must arise from facts. Here we are to presume facts to make presumptions: 1. That rent was demanded; 2. That there was an entry. If the demand was established, the rent might be presumed; not otherwise.

KENT, Ch. J. The lessor and his family abandoned the premises in 1778. In 1785, the landlord had a right to re-enter for non-payment of rent, and he *then* sold the land. In 1789, Kason, under his title takes possession. Here, then, is certainly 14 years' possession, and after that we will presume a regular re-entry at common law. Re-entry is a matter *in pais*, and not of record. In the case cited against Wilson, which was determined in January term, 1803, an affidavit of arrears was presumed. In the authority from the court of errors, the notice from the mortgagee was presumed to have been regular. Judgment, therefore, must be for the defendant.

Judgment for the defendant.

 KNAPP against ONDERDONK.

The court will not allow an amendment, in a justice's return, in a point contradicted by the affidavit of the justice himself, especially if after joinder he has noticed for argument on errors assigned.

SMITH moved for leave to the justice to amend his return.

Caines, contra. Independent of errors having been assigned and joinder, the justice has made an affidavit con-

Anonymous.—M'Kay v. Marine Ins. Co.

tradicting the existence of the fact in which the amendment is requested. Besides, two notices of argument, on the error assigned, have been given.

[*884] **Per Curiam.* . There is an evident *laches*. If the amendment is necessary, it ought to have been applied for before noticed for argument. The plaintiff in error must have known what was necessary to support his own assignment.

Amendment denied.

ANONYMOUS.

If circumstances tend to show a paper served by being put under a door has been received, the court will, unless the contrary appear, presume it has come to hand.

THE service of the case made in this cause was, by putting it under the door of the opposite attorney's office, which was locked, but from the window's being open when this was done, and being very shortly after seen to be shut, the plaintiff's attorney swore he had reason to believe the case came to the hands of the attorney of the defendant. From these circumstances, and their not being contradicted, the court was pleased to consider them as evidence of the case being received.

M'KAY *against* THE MARINE INSURANCE COMPANY.

If a party has had an opportunity of examining a transient witness, want of his testimony is no cause for putting off a trial. Absence of counsel is an excuse for not going to trial which the court discountenances.

THE defendants, at the New York circuit, moved to put

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off the trial, for want of the testimony of a material witness, who was a transient person, and had once been within their power. The court refusing to do this, a verdict went against them, in consequence of which, and the absence of their principal counsel, the defendants moved to set it aside.

Per Curiam. The decision at the circuit was right. Whenever a party has had an opportunity to examine a transient witness, and has suffered it to pass by, the want of his testimony is no objection to going to trial. In *Post v. Wright and Buchan*, (1 Caines' Rep. 111,) the absence of counsel was urged as an excuse, but the court refused to admit it, and we think all excuses of that sort ought to be discountenanced.

Motion denied.

FELTER *against* MULLINER.

The court will order a justice to amend his return by stating the evidence of a former trial for the same cause of action.

ON certiorari. The court ruled that if there has been a former trial for the same cause of action, and a justice refuse evidence of it, he will be ordered to amend his return, by setting forth the testimony offered.(a)

(a) See ante, 110, n. (a.)

Jackson v. Parker.—Leach v. Beekman.

[*385] *JACKSON, *ex dem.* KEMP and others, *against*
PARKER AND BREWSTER.

After a verdict for the plaintiff, if he neglect to make up the record the court will permit the defendant to do it; but if he apply to the court before request made to the plaintiff, costs of the motion will not be allowed on either side.

CAINES applied for a rule ordering the plaintiff, who had obtained a verdict, to make up the record within a given time, or that the defendant have leave to do it for him, as the verdict was complete evidence for the defendant in a suit in chancery between the same parties.

Smith resisted the application, because the defendant had never requested it to be done.

Per Curiam. Take your rule, allowing twenty days(a) for the plaintiff to make up the record and carry in the roll, but without costs on either side. Not to the defendant, because he ought to have made a request to the plaintiff before notice of application to the court; and we refuse them to the plaintiff because he ought not to have come here to resist.

Motion granted *nisi*, but without costs.

LUCKET and others *against* BEEKMAN and others.

The word seized imports of a fee.

If a party named in a petition, for partition, be stated to be seized of a certain portion, the court will intend it to be of a fee.

(a) *Kelliotas v. North*, Cole, 49, four days allowed.

Anonymous.—M'Kenzie v. Wilson.

ANONYMOUS.

Notice by advertising.

THE court said that in all cases where a three months' advertisement is required, a weekly notice is sufficient.

M'KENZIE *against* WILSON.

Trial by record.

TRIAL by record is a non-enumerated motion. See 1 Caines' Rep. 6.

MITCHELL *against* INGERSOLL.

If it appear diligence has been used to obtain the transcript in error, during a reasonable expectation of which a default has been entered for not assigning errors, it will be set aside on payment of costs.

THE rule for assigning errors having expired, the defendant entered a default against the plaintiff.

Hopkins moved to set it aside, on an affidavit stating that *the transcript had been written for, [*286] and was, when the rule expired, daily expected.

Whiting, contra, urged that an order to enlarge the time for assigning errors ought to have been obtained.

Per Curiam. No laches is imputable to the plaintiff. He had reasonable grounds for expecting the transcript: let, therefore, the default be set aside on payment of costs.

Motion granted on costs.

Ludlow v. Heycraft.—Codwise v. Hacker.

LUDLOW against HEYCRAFT.

A plea sent by the post, will save a default.

THIS was an action against the acceptor of a bill of exchange, in which the plea, having been sent by the post, did not arrive in time, in consequence of which a default was entered. See 1 Caines' Rep. 67, n. (b.)

Henry moved to set it aside, on affidavit that the acceptance was conditional.

Williams resisted, because it did not appear to have been on the face of the bill.

Henry, in reply. It might have been verbal, and is sworn to.

Per Curiam. Take your motion on payment of costs.
Motion granted.

CODWISE and others against HACKER.

In future no trial by proviso without previous rule to be obtained on notice.
Counsel of the court have privilege.

THE defendant in this cause, without any previous rule for trying it by proviso, gave a simple notice that he should bring it on, but inserted a proviso clause in the *venue*. Under these circumstances he obtained a nonsuit at the last term, to set aside which, application was now made on behalf of the plaintiff, who did not notice for trial; the court, however, refused the motion, in consequence of the proviso.

 Regulæ Generales.

clause being inserted in the *venire*, but at the same time made the following general rule :

Ordered, that hereafter the defendant shall not try a cause by *proviao*, without a previous rule for that purpose, to be granted by the court on the usual notice.

IN the case of Thomas Addis Emmet, Esq., who was admitted, in this term, to the degree of counsellor, the court determined that alienism was no bar to admission, (a) our statute *not requiring the oaths of [*387] abjuration and allegiance to be administered either to counsel or attorneys, and this court having, therefore, no power so to do. That the only oath requisite was that of office; nor could they conceive how the practice of admitting the others had crept in, unless from the old colonial practice, under the statute of 13 Wm. III, c. 6, made to secure the crown against the Pretender, by the provisions of which counsellors and attorneys are enjoined to take the oaths of allegiance and abjuration. But by those of 4 Hen. IV, c. 18, from whence our act is borrowed, the oath of office only is prescribed, upon taking of which Mr. Emmet received his license.

N. B. It was ruled that a counsellor of this court is entitled to privilege, and must be proceeded against by bill as present in court, and not by writ.

 REGULÆ GENERALES.

ORDERED, that in future only the oath of office be administered to persons admitted as counsel or attorney in this court.

(a) See ante, 261, n. (a.) *contra*.

Regule Generales.

ORDERED, that in error on certiorari under the 161 act, the plaintiff be entitled to have taxed against the opposite party, only for a general assignment of error, special assignments being unnecessary, as the court is bound to decide on the merits, and overlook the defects of form.

END OF FEBRUARY TERM.

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2. A father cannot maintain an action for debauching his daughter, per *quod servitium amittit*, if it appear that he connived at the intercourse with his daughter, nor can he avail himself of a custom of the country for persons courting to sleep together. *Boyer v. Stingerland*, 219

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tainly that the defendant cannot com-
pel performance, it is fatal on demur-
rer, though the plaintiff in his repli-
cation show a breach in a part that
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2. If a submission be "so that the
award be made in writing ready to
be delivered," it need not be stated
in *loquidam verbis*, if circumstances from
whence it must necessarily be inferred
that it was in writing, be averred.
Therefore, alleging it to have been in
"form following," when it contains a
reference to its date, and stating in
an averment "after the date thereof
and a rejoinder specifying a fact" be-
fore the date of the "award," are
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fection, if any, in stating the award
is cured by the rejoinder. An allega-
tion that an award was made neces-
sarily implies it was ready to be de-
livered. Though an award mention
a thing by a different name than that
by which it is described in the sub-
mission, it is not on that account a
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thing mentioned in the submission, and
in such case, if the breach be assigned
on that very thing, by the name given
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1. If by the laws and usages of any country, an L. S. in ink be used to instruments instead of seals, such instruments may be declared on in this state as sealed instruments, therefore, debt on a bond will lie, in this court on a Pennsylvania bond so signed. If the surname in an obligation vary in the spelling, but not much in the sound from that in the subscription, the obligor may be sued by the name he has signed, without an *alias dictus* as to the name in the deed. *Meredith v. Hinsdale*, 362

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See SLANDER, 1.

COVENANT.

1. The words "grant, bargain, sell, alien, and confirm," in a conveyance in fee, do not imply a covenant of title. It is implied only by the word "dedi" or "give." *Frost and others v. Raymond*, 188

See WARRANTY, 2.

CUSTOM.

See ACTION, 2.

D

DAMAGES.

See PRACTICE, 86; SENT-OF, 1, 2; TRESPASS, 2.

DAY.

1. The nautical day begins at 12 o'clock at noon. *Dennis and Williams v. Ludlow*, 111

DEBT.

See BOND, 1.

DEBTORS, ABSCONDING AND ABSENT.

1. A person who has been merely transiently within the state, cannot be proceeded against as an absconding or concealed debtor, and to authorise proceedings against him as an absent debtor, the creditor who takes

them must be a resident within the state. If a debtor do not actually reside within this state, though he lead so roving a life, as to render it very difficult to fix on his domicile, his being transiently here will not make him a resident within the meaning of the act affording relief against absconding debtors. *In the matter of I. G. Fitzgerald*, 318

DECLARATION.

See ERROR, 2; PLEA AND PLEADING, 6; PRACTICE, 59, 60.

DECLARATIONS.

See EVIDENCE, 1; DEVISE, 1.

DEGREE.

See ADVERSE POSSESSION, 1.

DEFAMATION.

See SLANDER.

DEFAULT.

See PRACTICE, 29, 37, 77, 80, 94, 95.

DEED.

See EVIDENCE, 3.

DELIVERY.

See SALE, 1.

DEMAND.

See PROMISSORY, NOTE, 4, 5; JUDGMENT, 4.

DEMISE.

See TENANTS IN COMMON, 1.

DEMURRER.

See AWARD, 1, 2; PLEA AND PLEADING, 5, 6; PRACTICE, 3, 27, 45, 64, 68; PROMISSORY NOTE, 5.

DEPARTURE.

See AWARD, 2.

DEPARTURE ON VOYAGE INSURED.

See INSURANCE, 3.

DEPOSITE.

See LOSS, 1.

DESCENT.

See FORTUITUM, 1.

DEVIATION.

See INSURANCE, 16.

DEVISE.

1. If a testator devise a specific quantity of land, out of a larger tract, and then describe the courses and distances to be run, if, by stopping at one of the lines mentioned, the devise will fall short, it will be held that the line was mentioned under the supposition that it would include the quantity devised, and the devisee will be entitled to have it run out that length. The erecting a fence, and showing it as a boundary, does not conclude the party so doing, if at the time such declarations are made that he is entitled to more. *Jackson, ex dem Zimmerman, v. Zimmerman and others*, 146

2. A devise of "all my right in the patentees' woods to my children, in case the same continue to inhabit the town of Hurley, otherwise not," passes the fee if there be one in the testator, and is a condition subsequent, if it be a condition at all, but is, *ut sem.*, void as repugnant to the nature of a fee. It is not a limitation for want of a devise over; and if the devise itself be to the testator's heirs, it is void as a condition, because the devisees themselves would be the persons to take advantage of it. A residuary clause of a testator's "whole real estate, except what I have before disposed of," will not carry an estate previously devised on condition, nor

does it operate as a conditional limitation. *Newark and others v. Newark and others*, 345

DISCONTINUANCE.

See PRACTICE, 83.

DIVISION OF THE COURT.

See PRACTICE, 28.

DOMICIL.

See DESTROY, ABANDONING AND ASSENT, 1.

E

EJECTMENT.

1. A possession of forty years on an acknowledged, though erroneous line, is a good bar to a recovery in ejectment. A parol agreement, to abide by a certain division line, will be sufficient, *et sem.*, to prevent either party from claiming in ejectment contrary to it, though it will not pass the land; but such agreement may, it would seem, be revoked or modified by a subsequent parol agreement. *Jackson, ex dem. Nellis, v. Dyeing*, 199

2. A tenant deriving title under a lease cannot dispute his landlord's right by showing the premises are in another patent. *Jackson, ex dem. Bleecker, v. Whitford*, 215

3. Ejectment is merely a possessory remedy, and therefore if a landlord in possession bring it to bar the right of his absconding lessee it cannot be maintained. *Jackson, ex dem. Clowes, v. Hakes*, 335

4. After a lessee has quitted premises demise, without proof of ever having paid rent, and after a 14 years' possession under conveyances from a lessor who had a right to enter in default of payment, a demand and re-entry will be presumed. *Jackson, ex dem. Goess, v. Damsen*, 532

See ADVANCE POSSESSION; CONVEYANCE, 1; EVIDENCE, 4, 5; PRACTICE, 52, 60, 67; TENANTS IN COMMON, 1.

ENUMERATED MOTION.

See PRACTICE, 17, 27.

ENTRY.

See EJECTMENT, 4.

ERROR.

1. It is error in a judgment before a justice not to state it to have been rendered "on hearing the proofs and allegations." *Stocking v. Driggs*, 96

2. It is not error in proceedings before a justice for a penalty that neither the name of the plaintiff, nor the title of the statute on which the process was issued were endorsed on the warrant agreeably to the directions of the act "to redress disorders by common informers." If the return to a *certiorari* state the warrant to have issued in pursuance of the act, and the defendant below appear and go to trial, he cannot assign for error that a warrant was issued instead of a summons, as his appearance has cured and waived the irregularity, if any. After appearance and pleading to issue, defects in the warrant or process cannot be assigned for error, nor can a variance in the declaration from the process, for it is cured by pleading in chief. It is not error that the warrant is in the name of an individual, and the declaration, *qui tam*, on behalf of the plaintiff and others. It is not error that a second *venire* has been issued when it appears that the first has been lost or mislaid; nor can it be assigned as such by the party at whose request it has issued, on the first not being returned. It is not error that a justice has continued his court from day to day; nor is it such that the return does not state the parties to have been present at the trial, if it state that the jury heard the proofs and allegations. But it is fatal on error if it appear that the oath administered to the constable sworn to keep the jury was not according to law. *Day v. Wilber*, 134

3. It is error in *assumpsit*, by husband and wife, not to show why the wife is joined. So if a jury be delivered in charge of a person not a constable. *Staley v. Barkite and Wife*, 221

4. In error on *certiorari* under the ten pound act, the plaintiff is to have taxed against the opposite party only the general assignment of errors, 385

See AMENDMENT, 1; CERTIORARI; PRACTICE, 39, 40, 72, 87, 94.

ESTOPPEL.

See AWARD, 2.

EVIDENCE.

1. Evidence of the declarations of a person as to owning a slave, cannot be received to render a parish chargeable when the person himself might have been produced. *Germantown v. Livingston*, 106

2. A copy of proceedings in a foreign tribunal, certified under the seal at arms of a foreign minister of the kingdom in which the tribunal exists, is not even *prima facie* evidence, unless it be made appear such minister has the official custody of such proceedings. *Vandervoort and another v. Smith*, 155

3. If a statute, without any negative words, declare that all former deeds shall have in evidence a certain effect, "provided" such and such requisites are complied with, this does not prevent their being used as testimony in the same manner as if the act had never been passed. The law of the 8th of January, 1762, declaring that every former division of lands, of which there was a map or note in writing under the hands of the proprietors, should be a valid partition thereof, provided such map or note be proved before a judge of the supreme court, and a true copy of such map be filed, and such note recorded, does not prevent an antecedent map or deed being read in evidence to prove a partition. *Jackson, ex dem. Van Den Berg and others, v. Bradt*, 169

4. The book of the judge of the court of probates, containing the record of the probate of a will, may be given in evidence in ejectment, if it be proved that the original will is lost. *Jackson, ex dem. Donaldson, v. Lucett*, 363

5. And of such loss not finding the

original, if it be an ancient will, in the office of the surrogate, is evidence, *ib.*

See CONSIGNMENT, 1; DEVISE, 1; EJECTMENT, 2; INSURANCE, 11, 12; NEWLY DISCOVERED EVIDENCE; PARTNER AND PARTNERSHIP, 2; PRACTICE, 17, 38, 44, 90; PROMISSORY NOTE, 1; SLANDER, 1; TRESPASS, 3; VAN SLYCK PATENT, 1.

EXCUSE.

See PRACTICE, 34, 36, 46, 57, 66, 68, 78, 79, 84, 86, 89.

EXECUTION.

1. A sheriff cannot levy on goods by virtue of a *fi. fa.* after the return day is past. *Devoe v. Elliot*, 245

See ATTORNEY, 1; PARTNERS AND PARTNERSHIP, 1; PRACTICE, 9, 54; PROMISSORY NOTE, 5.

F

FATHER AND CHILD.

See TRESPASS, 3.

FAVOR.

See CHALLENGE, 1.

FEE-SIMPLE.

See CONSTRUCTION OF WORDS; DEVISE.

FENCE.

See DEVISE, 1.

FIERI FACIAS.

See EXECUTION, 1; PRACTICE, 9.

FORCIBLE ENTRY AND DETAINER.

1. The court will quash a convic-

tion for a forcible entry and detainer if the indictment do not state the complainant to have been seised, or possessed of the premises. So, *ut sembl.*, if the grand jury, by whom the bill was found, consisted of 24 persons, or the defendant be not on his voluntary appearance, permitted to traverse. On quashing the conviction, a writ of re-restitution will be ordered, though it appear that the defendant's term be expired. *The People v. King*, 98

FOREIGN MINISTER.

See EVIDENCE, 2.

FOREIGN PROCEEDINGS.

See EVIDENCE, 2.

FORFEITURE.

1. Lands descending between indictment and conviction are forfeited under the act of October, 1779, against persons adhering to the enemies of the state. *Jackson, ex dem. Pell v. Prevost*, 164

FRAUD.

See EJECTMENT, 1; WARRANTY, 1.

FREIGHT.

See INSURANCE, 2.

FRIVOLOUS PLEA.

See PRACTICE, 75.

G

GENERAL AVERAGE.

See INSURANCE, 15, 16.

GENERAL ISSUE.

See ERROR, 2; PLEA AND PLEADING, 1; TRESPASS, 1.

GOVERNMENT OFFICER.

1. A government officer, sworn to act faithfully, according to the best of his ability, and perform his duty without any wilful omission, and authorized to act "according to his judgment, his opinion, and as things shall appear to him," is, in the line of his duty, a judicial officer, and not liable to an action for want of skill, or error in judgment; *aliter*, if he proceed *mala fide*, or from malice, or other corrupt motive. Under the law for repacking and inspecting beef, an offer by a cooper to brand a cask, and a refusal by the inspector-general to have it branded, are not equivalent to a branding, he having no authority to order or refuse the branding of a cask. *Seaman v. Patten*, 312

H

HEIRS.

See DEVISE, 2.

HIGHWAYS.

See CERTIORARI, 1.

HOSICK PATENT.

1. The boundaries of the Hosick patent are according to the survey made by I. R. Bleecker, in 1754. *Jackson, ex dem. Quackenbush, v. Dennis*, 177

HUSBAND AND WIFE.

See ERROR, 3.

I

ILLEGAL CONTRACT.

1. An action will not lie upon a contract to pay over half the proceeds of an illegal contract, though the money arising from it has been received by the defendant. *Belding v. Pitkin*, 147

ILLICIT TRADE

See INSURANCE, 13.

IMPLICATION.

See COVENANT, 1; PROMISSORY NOTE, 5; WARRANTY, 1, 2.

IMPROVEMENTS.

1. The claim for the value of improvements under the act of the 5th of April, 1803, will depend on the report of the circuit judge, to whom title must be shown. An offer to pay the appraised value made by the plaintiff before suit brought, will entitle him to costs. *Jackson, ex dem. Spilsbury, v. Watson*, 105
2. A tenant entering under a person claiming the whole in severalty, is not entitled, under the acts of March, 1785, and February, 1791, to the value of his improvements from persons recovering as co-tenants. *Jackson, ex dem. Van Den Berg and others, v. Bradt*, 303

INDICTMENT.

See PARDON, 1; FORCEIBLE ENTRY AND DETAINER, 1; ADDITION, 1; MALICIOUS PROSECUTION, 1; PRACTICE, 26, 63.

ENDORSER, ENDORSEE.

See PLEA AND PLEADING, 6; PROMISSORY NOTE, 1, 3, 4.

INQUEST.

See PRACTICE, 2, 66, 74, 77, 86.—

INTEREST.

See INSURANCE, 2, 12; PRACTICE, 51

INTERLOCUTORY JUDGMENT.

See PRACTICE, 33.

INTENDMENT.

See CERTIORARI, 1, 2.

INSANITY.

See PARDON, 1.

INSOLVENT.

See PRACTICE, 25, 83.

INSURANCE.

1. To constitute a blockade, so as to affect a policy of insurance by a violation of it, there must be an actual existing force before the port, at the time it is entered. The *animus reverendi* of an obsidiary fleet does not continue the blockade, nor is the entry of a neuter, after being warned, a breach of his neutrality, if the blockading force be not before the port. If a vessel be driven into a port of necessity, and a pestilential disorder break out, which renders it impossible for her to pursue her voyage, it is a loss within the perils of a policy. *Williams v. Smith*, 1

2. The purchaser of a vessel bottomed, not knowing her to be so, has an insurable interest in her, and the policy underwritten in ignorance of such fact, is not thereby vacated. If, under such circumstances, the vessel be in the course of her voyage sold under the bottomry, after an abandonment for want of funds to carry it on, the underwriter will be liable on his policy, deducting the amount for which the vessel sold, from the sum at which she was valued. When the insured is master and consignee, and joint owner of the cargo, his selling it in a port of necessity, where the voyage was broken up, will be deemed a reception of the goods there by him as owner, and as *pro rata* freight earned; the insurer on it is, therefore, liable only for the balance. *Williams v. Smith*, 13

3. In a policy effected in New York upon goods at twelve cents per pound, the weight will be determined by the English standard, though the invoice specify the weight to be French. *Gracie v. Bowne*, 30

4. If the assured have information of a violent storm the day after his vessel has sailed, and he state only that there has been blowing weather on the coast, it is a misrepresentation which will avoid the policy. *Ely v. Hallett*, 57

5. In an action on a policy of insurance, averring the loss by barratry, if the plaintiff show a loss from a fraudulent act of the master, the presumption of law is, that it was for his own benefit, and the assured, in order to entitle him to recover, need not affirmatively show it to have been so. *Hendrick v. Delafield*, 67

6. An assignment of part of the subject insured to a belligerent, though after capture, is a breach of a warranty of neutral property. *Goold v. United Insurance Company*, 73

7. If the defects in a vessel, existing previous to the effecting a policy of insurance, be not such as to render the vessel unseaworthy, though she may demand repairs on her voyage, if she perish in its prosecution, the amount of the repairs required for the anterior defects are not to be deducted from that of the verdict, if rendered for a total loss. *Depeyster v. Columbian Insurance Company*, 85

8. Whether a vessel which moves down a river, on the route in a voyage insured, has actually sailed on it, is a fact depending on circumstances and the *quo animo*. If she has not taken her captain on board, it is a presumption that she has not commenced her voyage, though all her papers, clearance and lading be taken in. On a warranty depending on a matter of fact, the jury are the proper judges. *Dennis and Williams v. Ludlow*, 111

9. A voyage from one port to another through an intermediate port, where the goods are to be landed, and reshipped to those of their ulterior destination may be insured as a voyage from the first to the second port, without mentioning the third. *Steinbach v. Columbian Insurance Company*, 129

10. If an assured be indebted to his broker, and give him a policy to effect an adjustment, which he does, and thereon *debit* the insurer with the amount, and carries the same to the credit of the assured, it is not payment to him, unless he assent. *Bethune and Smith v. Neilson and Bunker*, 139

11. Where a policy is clear, certain, and unambiguous as to the voyage insured, propositions asking the rate of insurance for another voyage cannot be resorted to as representations to show the voyage insured was meant to be restricted to that de-

scribed in the proposition. *Vander-voort and another v. Smith*, 155

12. If the acting partner in a concern of two, cause an insurance to be effected for the amount of his own share, and the policy state it to be on his account, but retain the general printed words of "whomsoever else it may concern," the insurance will be held to have been made on the joint account, if such appear to have been the intention of the assured, and to gather this intention, the letters of the assured may be resorted to, though they were never shown to the underwriter, who subscribed upon seeing instructions to insure only on the separate account of the acting partner. Under such circumstances, if the policy be for half the cargo, and on capture half be condemned, and half be acquitted, the assured can recover only a moiety of the sum insured. *Lawrence v. Ebor*, 203

13. Under a warranty against seizure, on account of illicit trade, the underwriter is liable for a loss by illicit trade barratrously carried on by the master. A representation, in time of peace, that a vessel shall sail in ballast, is substantially complied with, though she sail with a trunk of merchandize and ten barrels of gunpowder, laden on board without the knowledge of the owner. *Suckley v. Delafield*, 222

14. If an assured, having written several letters ordering insurance, and transmitted them by different conveyances, arrive, after a knowledge of a loss, with one of the letters, at a port from whence it is forwarded by the post, he is bound to countermand the order by the same mail. *Watson v. Delafield*, 224

15. If a vessel be, from sea damage, obliged to bear away to a port of necessity, in order to refit, the wages and provisions, from the moment of bearing away to the period of sailing on her original voyage, constitute a subject of general average, the proportion of which may be recovered in an action of *assumpsit*, by the owners of the ship, against the proprietors of the cargo. *Walden v. Le Roy*, 263

16. Where the *termini* of the voyage insured are preserved, it is only a deviation to touch at any intermediate port; and though it be resolved on before the voyage commence, it is not on that account an altered, or different voyage from the one described in

the policy, and the insurer will be liable for any loss before arriving at the dividing point. Wages and provisions are subjects of general average from the time of being obliged to bear away to a port of necessity in consequence of injuries received, and recoverable under a policy on the ship. *Henshaw v. Marine Insurance Company*, 274

17. After an abandonment and payment of loss, a purchase of the property insured, by the agent or correspondent of the underwritten, though made after condemnation, is for the benefit of the insurer, if he elect; therefore the proceeds of a purchase so made, and any cargo in which they may be invested, become, if he pleases, his property, and he may maintain trover for it against the assured. *United Insurance Company of New York v. Robinson and Harishorne*, 280

18. If an assured, after capture, appoint an agent to prosecute his claim, such agent after abandonment becomes the agent of the assured, and a receipt by him of the money for which the property has been sold, will be deemed a receipt by the insurer, who must look to the agent for the amount, and pay the assured his full loss without any deduction. All acts by such an agent, if *bona fide*, bind the underwriter. *Miller and Graham v. De Peyster and Charlton*, 301

19. The arrival of a vessel at a port insured to, from a port insured from, though she may have sailed subsequent to the vessel insured, affords no ground for presuming the assured had any knowledge of the bad weather the arriving vessel had sustained, nor that the assured received information of the sailing of his vessel by the one which arrived, when circumstances show it might have been received another way. A representation saying, "I am informed of the vessel's sailing, and she is out this day twenty-six days," is not an assertion as a fact that she is out twenty-six days, and, therefore, is not a misrepresentation, though she may have been out twenty-seven. If a vessel be insured as out of time, and she be out one day more than the information received specifies, if the jury do not find it to be material, the court will not say it is so. *Williams v. Delafield*, 329

20. If an insurance be on a return cargo, beginning the adventure "from and immediately after the loading

thereof on board the said vessel," at the port of destination, with liberty to touch and trade at two intermediate ports, the policy will not cover the outward cargo from the port of destination to one of the intermediate ports, though the vessel was obliged to carry it there, in consequence of being refused permission to enter that of her destination; the premium, therefore, must be returned, as the risk never attached. *Graves and Scriba v. Marine Insurance Company*, 339

See CHALLENGE, 1; COMMISSIONS, 1; SET-OFF, 1, 5.

IRREGULARITY.

See PRACTICE, 3.

J

JOINDER IN ACTION.

See PRACTICE, 41.

JUDGE'S CERTIFICATE.

See MALICIOUS PROSECUTION, 7; PRACTICE, 42.

JUDGE'S CHARGE.

See BILL OF EXCEPTIONS, 1.

JUDGE'S ORDER.

See LIREL, 1.

JUDGE'S REPORT.

See IMPROVEMENTS, 1.

JUDGMENT.

1. Judgments docketed previous to the passing of the bankrupt law of the United States, remain a lien on the lands then held by the bankrupt, and have a priority in payment, out of the lands affected by them, before the general creditors, the commissioners' assignment passing such lands, subject to all judgments so docketed, if the

judgment creditor has not come in under the commission. *Livingston v. Livingston*, 300

See ERROR, 1; PARTNERS AND PARTNERSHIP, 1; PLEA AND PLEADING, 3; PRACTICE, 28, 29, 31, 54, 55; PROMISSORY NOTE, 5.

JUDGMENT CONFESSED.

See PLEA AND PLEADING, 3.

JUDGMENT BY DEFAULT.

See PRACTICE, 37, 77.

JUDGMENT IN CASE OF NON-SUIT.

See PRACTICE, 6, 13, 14, 15, 16, 20, 21, 50, 78, 79, 84.

JUDGMENT RECOVERED.

See PLEA AND PLEADING, 2; PROMISSORY NOTE, 2, 3.

JUDICIAL OFFICER.

See GOVERNMENT OFFICER, 1.

JURISDICTION.

See JUSTICE OF THE PEACE, 1; SLANDER, 1; TRESPASS, 1.

JURY AND JUROR.

See CERTIORARI, 2; ERROR, 3; INSURANCE, 8; PRACTICE, 26, 35, 63, 85.

JUSTIFICATION.

See TRESPASS, 1.

JUSTICE AND JUSTICES' COURT.

1. A justice of the peace cannot grant a warrant to apprehend a criminal for an offence committed in another state. *The People v. Samuel and Job Wright*, 213

2. If a non-resident plaintiff sue by warrant before a justice, and will not consent to an adjournment for more than three days, in no case can the justice adjourn over that time. *Undec v. Goodspeed*, 245

See AMENDMENT, 1; CERTIORARI; ERROR, 2, 3, 4; PLEA AND PLEADING, 1; PRACTICE, 22, 87, 90.

L

LETTERS.

See INSURANCE, 12.

LEVY.

See EXECUTION, 1; PARTNERS AND PARTNERSHIP, 1; PRACTICE, 54.

LIBEL.

1. In an action for publishing a libel, the court will discharge a judge's order for holding to bail, unless special cause be shown by affidavit. *Glason v. Gould*, 47

2. In an action for a libel, the court will not, on the common affidavit, change the *venue* from the county in which circulated to that in which printed and first published. *Clinton v. Croswell*, 245

LIEN.

See JUDGMENT, 1; SET-OFF, 2.

LIMITATION.

See DEVISE, 2.

LOCATION.

See VAN SLYCK PATENT, 1.

LOSS.

1. If two persons enter a bank at the same time, one with money and one without, the latter of whom informs the cashier it is to be deposited on his account, this circumstance alone,

without any acts of the other party confirming such account, will not justify the cashier in carrying the money to the account of the party saying it is his; if he do, and pay money, or give credit on the strength of such deposit, to such person, the bank must bear the loss. *Winter v. Bank of New York*, 337

M

MAKING UP RECORDS.

See PRACTICE, 98.

MALICIOUS PROSECUTION.

1. To warrant the granting a copy of an indictment, to ground an action for a malicious prosecution, the malice should appear from circumstances at the trial, declarations out of court, or certificate from the judge that he thinks it ought to be granted, which he may give though he be off the bench and has signed one which proves insufficient. *The People v. John P. Poylton*, 202

MANDAMUS.

See PRACTICE, 23.

MAP.

See EVIDENCE, 3.

MASTER OF SHIP.

2. A master of a ship can bind his owner by a bill of exchange drawn for necessaries. *Mitford v. Haller*, 77

See INSURANCE, 2; WITNESS, 1.

MERITS.

See PRACTICE, 2, 3, 11, 66.

MISDIRECTION.

See PRACTICE, 11.

MISJOINDER.

See PRACTICE, 41.

MISNOMER.

See ADDITION, 1; BOND, 1.

MISREPRESENTATION.

See INSURANCE, 4, 9, 19.

MISTAKE.

See PRACTICE, 35.

N**NEUTER AND NEUTRALITY.**

See INSURANCE, 1.

NEWLY DISCOVERED EVIDENCE.

See PRACTICE, 17, 36, 61.

NEW TRIAL.

See BILL OF EXCEPTIONS, 1; PRACTICE, 10, 11, 17, 35, 36, 44, 61.

NEW ASSIGNMENT.

See PLEA AND PLEADING, 5.

NON-ENUMERATED MOTION.

See PRACTICE, 43, 54, 57, 85, 93.

NON-RESIDENT.

See JUSTICE OF THE PEACE, 2

NONSUIT.

See PRACTICE, 6, 13, 14, 15, 16, 20, 21, 50.

NOTICE.

See ATTORNEY, 1; PRACTICE, 3, 18, 18, 29, 30, 37, 54, 57, 58, 68, 92; PROMISSORY, NOTE, 1, 4.

NOT GUILTY.

See PRACTICE, 41.

O**OATH.**

See ERROR, 2; REGULE GENERALES, 3; TRANSLATIONS, 1.

OPPOSITION.

See PRACTICE, 68, 80, 82.

ORDER FOR INSURANCE.

See INSURANCE, 12, 14.

OYER.

See PRACTICE, 37.

P**PAPERS.**

See COPIES, 1; PRACTICE, 14; WITNESS, 2.

PARDON.

1. If a prisoner who has been pardoned on condition of leaving the United States within a limited time, do not depart, and is afterwards taken up for not so doing, he may, on its appearing to the court that he was deranged in his intellects, be discharged on condition of departing within the same period from the day of his discharge. *People v. James*, 57

PAROL AGREEMENT.

See EJECTMENT, 1.

PAROL EVIDENCE.

See **INSURANCE**, 11; **PRACTICE**, 38;
WARRANT, 3.

PARTITION.

See **ADVERSE POSSESSION**, 1; **CONSTRUCTION OF WORDS**, 1; **EVIDENCE**, 8.

PARTNERS AND PARTNERSHIP.

1. If one of two partners, without any authority from the other, execute a joint bond and warrant of attorney in the names of both, they are void as against the partner who did not sign; but if judgment and execution be thereon entered up and sued out against both, the court will not set them aside on the application of him who did sign, nor even of him who did not sign, but with respect to him they would order that no execution should go against his person or goods. Such bond and warrant of attorney are good against the party executing, who, on a joint bond so signed, may plead *non est factum*. If an execution be sued out for more than is due, the court will not, merely on that account, set it aside if it appear that the sheriff has received instructions, though not endorsed on the writ, to levy only what is actually owing, but the defendant, though his application be denied, will be entitled to costs if it do not appear that the directions to the sheriff were given before levy made. *Green and Mosher v. W. & J. Beale*, 255

2. One partner cannot maintain *assumpsit* against another, for a balance due on a joint transaction, unless evidence be given of an express promise. *Casey & Lawrence v. Brush*, 293

See **INSURANCE**, 12; **PLEA AND PLEADING**, 6; **PROMISSORY NOTE**, 3; **SALE**, 2.

PAYMENT.

See **INSURANCE**, 10.

12. If a debtor do not direct the application of a payment, his creditor

may place it to what account he pleases. *Mann v. Marsh*, 99

2. On an agreement to accept notes in payment of goods sold, if before delivery the notes turn out bad, a tender and refusal of them is no payment, unless the vendor agreed to run the risk of their being paid. *Roget v. Merritt and Clapp*, 117

PERIL.

See **INSURANCE**, 1.

PESTILENTIAL DISORDER.

See **INSURANCE**, 1.

PLEA AND PLEADING.

1. If a defendant before a justice rely, in an action of trespass, on his title, he confesses the trespass, and cannot, on moving the cause into this court, plead the general issue. *Strong and others v. Smith*, 28

2. To a plea of a judgment recovered, a replication denying the fact, may conclude to the country. A plea merely negating facts is not a special plea. The endorsing a plea by counsel is a signing. *Manhattan Company v. Miller*, 60

3. If an administrator, by his plea in this court, admit assets, on which there is a regular judgment entered, it will not be set aside, to let in a plea of a judgment confessed in the common pleas, after filing the plea in this, not even though the judgment taken on the assets admitted, be for a few cents more than in strictness appear to have been acknowledged. *Tremper v. Wright*, 101

4. If a defendant do not plead his discharge under the insolvent law, the court will not afford a summary relief. *Cross v. Hobson*, 102

5. If a plaintiff declare in trespass generally, and the defendant plead *liberum tenementum*, setting out the close with metes and bounds, the plaintiff should new assign. If he do not, and conclude with an averment, it is fatal on special demurrer. *Hallock v. Robinson*, 233

6. If the endorsement of a firm be stated in a declaration on a bill or note to be made to them as persons "using the name, style and firm," endorsed, and that they "endorsed

the said note, the proper handwriting of one of them, in their said copartnership name, style and firm, being to such endorsement subscribed," it is good on general demurrer. *Kane v. Scofield*, 368

See AWARD, 2; BOND, 1; ERROR, 2; PARTNERS AND PARTNERSHIP, 1; PRACTICE, 41, 83, 95; PROMISSORY NOTE, 1, 5; TRESPASS, 1.

POINTS.

See PRACTICE, 62, 76.

PORT OF NECESSITY.

See INSURANCE, 1, 2, 15, 16.

POSSESSION.

See ADVERSE POSSESSION; EJECTMENT, 4.

PRACTICE.

1. A struck jury will not be granted without affidavit of the intricacy or importance of the cause, though there be no opposition. *Livingston v. Columbian Insurance Company*, 28

2. Affidavit of merits sufficient to set aside an inquest taken at the circuit, and with costs. *Roosevelt v. Kemper*, 50

3. If proceedings be irregular, they will be set aside, though the defendant do not swear to merits, and the plaintiff swear there are none. *Depeyster v. Warne*, 45

4. It is not necessary in an affidavit to change the *venue*, to state the cause of action. If it be not transitory it should be shown by the opposite side. *Baker and Sloane v. Sleight*, 46

5. Leave will be granted to go to trial, notwithstanding a commission has been sued out, and the usual time for returning it is not elapsed, but this will not prevent showing cause at the trial to further postpone the cause. *Pell v. Bunker*, 46

6. If a defendant's commissioner has mislaid a commission, in consequence of which it has not arrived, but is shortly expected, the court will not grant judgment as in case of nonsuit, though there has been a former

stipulation, but will allow to stipulate anew on paying costs. *Cotes and others v. Thompson*, 47

7. When a stipulation is offered before notice of motion, then costs will be allowed up to the time of offer. When after notice, and before actual application up to that time, but when not till the court is applied to, all costs must be paid. *Anonymous*, 56

8. To take the effect of a motion for judgment on a frivolous demurrer, notice of bringing on the argument must be given, 56

9. A *fi. fa.* issuing into a different county than where the *venue* is laid is void. So is a *fi. fa.* tested out of term. *Simonds v. Cutlin*, 61

10. If a plaintiff examine his witness and deliver him over to the defendant to cross-examine, and before any opportunity offer to enable the plaintiff to ask him any questions in explanation, the witness fall down in a fit, and the plaintiff go on to examine other witnesses, and try the cause, the court will not afterwards grant a new trial to give the plaintiff an opportunity of letting in the further testimony of the same witness. *Depeyster v. Columbian Insurance Company*, 85

11. If a judge misdirect in one point, which does not go to the merits of the case, according to which the jury decide, the court will not, on that account, order a new trial, 56

12. Where a party has it in his power to enforce payment of costs awarded him by attachment, the court will not take the non-payment into consideration, in forming a subsequent decision on a collateral matter. An attachment in the first instance is not granted against a witness for disobeying a *subpoena*. The practice is, to move for a rule to show cause. *Jackson v. Mann*, 92

13. Absence of a witness is good cause for refusing judgment as in case of nonsuit, and even to excuse stipulating, 92

14. If a plaintiff be prevented from proceeding to trial for want of papers, which he had an honest fair cause to expect, it will be sufficient to prevent an application for judgment as in case of nonsuit, but not to excuse the costs of the circuit. *Jackson, ex dem. Van Bergen, v. Haight*, 93

15. If it appear the court would not have tried a cause at the circuit

- had the plaintiff been ready, judgment as in case of nonsuit will not be granted, and costs will be allowed only for the witnesses, up to the time when the determination of the circuit judge was known. *Id.*
16. If a number of causes depend on the same title, and a case is made in one, the plaintiffs need not continue to notice for trial circuit after circuit. If they do, the non-decision of the case will prevent judgment as in case of nonsuit, but will not exonerate from costs, *ut semb.* *Jackson, ex dem. Van Bergen, v. Haight,* 94
17. An application for a new trial on account of newly discovered evidence, is an enumerated motion. *Chandler v. Traynard,* 94
18. An affidavit of service, stating it to be by leaving notice and copy on the table of the opposite attorney, is not good, unless it also set forth that there was not any one in the office. *Jackson, ex dem. Norton, v. Gardner,* 95
19. No agreement between attorneys can be noticed unless reduced to writing. *Bain v. Green,* 95
20. If two causes turn on the same point and a verdict be given in one, on which a case is made, it is sufficient to prevent judgment as in case of nonsuit for not proceeding to trial in the other, or a stipulation, but will not excuse from costs. *Pulmer and others v. Mulligan and others,* 95
21. If a cause be submitted to arbitrators before a circuit, and an application be afterwards made for judgment as in case of nonsuit, it will be refused with costs. *Bradt v. Way,* 96
22. Wherever it is shown on the face of the counter-affidavits that the application noticed will be ineffectual, costs of resisting will follow *ut semb.*, 95
23. The affidavit for an attachment against judges of an inferior court for disobeying a *mandamus* ordering them to seal a bill of exceptions, ought to show that the persons served are those who ought to sign. *People v. Judges of C. P. of Washington,* 97
24. If special bail be duly entered, out notice thereof and of justification be not given till after the arrest of the bail, proceedings on the bail-bond will be stayed on payment of costs. *Morton v. Benjamin,* 98
25. If a prisoner be not brought up for his discharge under the insolvent law till the last day of term, and his creditor oppose him on an affidavit of showing probable cause of impeaching the fairness of his inventory, the court will remand till the next term. *Marcroft v. Butler,* 99
26. Withdrawing, by permission of the court, a juror in a criminal case, is not of itself a cause for arresting the judgment on a subsequent trial for the same offence. *People v. Barrett and Ward,* 100
27. An application for judgment on a frivolous demurrer is an enumerated motion, and has priority of other motions if the notice specify the application to be grounded on the frivolousness, and there be no opposition. *McCabe v. McKay,* 100
28. When the court is divided, judgment must go according to the verdict. But if an intimation for a special verdict has been given, and the bench be afterwards full, a second argument will be ordered, if the special verdict be not agreed to. *Van Dyck v. Van Beuren and Vosburgh,* 103
29. A notice to declare, plead, &c., need not specify "or that the default will be entered," but may say generally "or judgment." *Gardiner v. Buck,* 103
30. Notice of motion may be only for the first day of term without specifying the place where. *Bodwell v. Wilcox,* 104
31. If in a plea of set-off in the common pleas the sum for which judgment is rendered be under 25 dollars, the plaintiff must pay costs to the defendant. *Van Antwerp v. Ingersoll,* 107
32. If there be a *lis pendens* in the common pleas, in which there has been no decision, this court will not take up the point on a case made and submitted by consent. *Strovel v. Vrooman,* 107
33. If the names of two attorneys appear on the writ, subsequent proceedings may be in the name of one alone. Interlocutory judgment may be entered at any day after default, and before writ of inquiry executed. *Gould ads. Spencer,* 109
34. If a late decision be made of which counsel is not apprised, the court will, in some cases, allow of its being urged as an excuse for not making an earlier application. *Schoonmaker v. Trans,* 110

35. After a witness has been examined on interrogatories, and cross-examined and his depositions read, a new trial will not be granted, on a supplemental affidavit, stating mistake, or surprise. A new trial will not be granted, because of the discovery of new witnesses to the same fact; nor because a juror was challenged in the absence from court of the defendant's counsel. *Steinbach v. Columbian Insurance Company*, 129

36. An application for a new trial on account of a discovery of testimony must show it to have been discovered since the trial. It is not sufficient to say it has been received since, for its not having been received might be urged as a reason for not trying. *Vandervoort and another v. Smith*, 155

37. If on demand of *oyer*, that given be different from that set out, the plaintiff cannot, without rule or notice, after service of a true *oyer*, sign judgment by default. If it be done the court will set it aside, with costs. *Clinton v. Porter*, 176

38. When a defendant cross-examines a plaintiff's witness, he makes him his own. Therefore, perol testimony of a deed or will, disclosed by such witness, in the possession of the plaintiff, cannot be received without notice to produce it. *Jackson, ex dem. Van Slyck and others v. Son*, 178

39. Under the act concerning costs, a plaintiff must recover above fifty dollars damages, exclusive of the six cents or other costs, to entitle him, in the supreme court, to costs of increase. The word "recover," in the statute, means what shall be assessed as damages, *eo nomine*. *Van Horne v. Petrie*, 213

40. So in the common pleas the damages, exclusive of costs, must be above twenty-five dollars. *Seaman v. Bailey*, 214

41. A count in *assumpsit*, and one on a warranty on a sale, may be joined, and not guilty pleaded to both. If not guilty be pleaded to the warranty, and *non assumpsit* to the other count, and the plaintiff take judgment on the *assumpsit*, and enter a *nolle prosequi* on the warranty, the misjoinder is not moveable in arrest of judgment. *Hallock v. Powell*, 216

42. If the plaintiff in trespass recover in this court under 50 dollars, he will not be entitled to costs, unless the judge certify that the freehold

came in question. *Flurington v. Rensie*, 220

43. A motion in arrest of judgment is a non-enumerated motion, and the reasons need not be specified. *Hough v. Stover*, 221

44. On a motion to set aside a verdict, as not warranted by the facts, the court will not receive testimony or affidavits to supply what was deficient at the trial, in order to prevent a new investigation, unless the testimony be incontrovertible in its nature, such as a record, or the like. If the testimony be for the purpose of affording further inquiry, the court will receive it. *Watson v. Delafield*, 222

45. Amendment allowed, on payment of costs, after demurrer argued and the judgment of the court pronounced, though an amendment had once before been granted. *Hallock v. Robinson*, 233

46. Being a public officer affords no excuse for not going to trial, nor does his cause acquire any preference. *Anonymous*, 246

47. A stipulation by a counsel in the cause is good. *Wilcox v. Woodhall*, 250

48. The court will renew a rule for an attachment if it has not been forwarded by the clerk in time to be duly served. *Waddington v. Chamberlain and Glason*, 251

49. When the court consists of only two, alight grounds will make them refuse vacating a rule granted on argument in full court. *Day v. Wilber*, 251

50. Motion for judgment as in case of nonsuit must be in the next term after the neglect. *Mumford v. Columbian Insurance Company*, 251

51. If in cross suits one has been referred, in which all may be obtained that can be gained by a reference in the other, the court will not refer such other, especially if there be a possibility that by so doing the report may be so apportioned as to throw the costs of both suits on one party, who by a decision of the court seems to have a right to a verdict in his favor in one of the suits. *Codwise and another v. Hacker*, 251

52. If a plaintiff delay his own verdict, interest will be taxed to him only down to the day when rendered. On granting a new trial, costs are allowed of course, unless when expressed otherwise, or for a misdirection. So if the application be denied, costs for

resisting follow. *Williams v. P. M. Smith*, 253

62. After a second commission has issued, with leave to go to trial notwithstanding, the court, on special circumstances, since discovered, will vacate the rule as to going to trial, and allow a further time for the return. *Ferris v. Smith*, 253

63. If a judgment has been entered, and execution sued out for the penalty of a bond, the court will set aside the execution, and order satisfaction to be entered, on payment of the debt, and interest due on the condition, with the costs of the suit, though the bond was given for a larger debt than that mentioned in the condition, and for the overplus, a promissory note had been given, which is unpaid, and for which there was, at the time, a verbal agreement, execution should be taken out if it was not duly honored. No more can be levied by an execution, on a judgment upon a bond, than the sum due on the condition. A notice signed with the christian and surname of an attorney is good, though it have not the addition of "attorney for," &c. A motion cannot be supported by an affidavit, not served, though the matter it contain be not known till the day of application. A copy ought to be served, and a motion made on the next day. *Bergen and Garrison v. Boerum*, 256

65. If judgment of reversal has been pronounced, and on the next day the court improvidently order an amendment in the point on which it has proceeded, without notice of the application having been given, it will so far vacate such order as to grant a rule to show cause against such amendment. *Day v. Wilber*, 258

66. To warrant issuing a commission before issue joined, there must be special circumstances disclosed. *Anonymous*, 259

67. Notice of a non-enumerated motion may be for an enumerated day, if accompanied with an excuse for not being given for the first day. *Jackson, ex dem. ———, v. ———*, 259

68. A commission cannot be applied for without notice, though the decision rendering it necessary, be pronounced on the last Friday in term. *Watson v. Delafield*, 260

69. A new count on the demise of a new lessor, may on terms be added

to a declaration in ejectment. *Anonymous*, 261

60. And this seems of course. *Anonymous*, 261

61. On an application for a new trial on account of newly discovered evidence, if the information be stated to have been given through A. B., a person of character and reputation, affidavits to show he is not worthy of credit may be read. *Pomroy v. Columbian Insurance Company*, 260

62. If the points intended to be relied on in argument have not been subjoined to the case made, service of a copy of them on the judges and adverse party at the time of bringing on the argument is sufficient. *Henshaw v. Marine Insurance Company*, 274

63. After a prisoner has pleaded to an indictment, the jury been sworn, and evidence offered, if the public prosecutor, without the prisoner's consent, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment; if he be it is good cause for arresting the judgment. *The People v. Barretti & Ward*, 304

64. On a *venire tam quam*, the plaintiff has it in his election to assess contingent damages on the trial, in facta, before arguing the demurrer, or argue the demurrer first and assess his damages afterwards. *Munroe v. Akira*, 320

65. A subpoena ticket for a person to attend as a witness in this court is good, though it does not specify the place where to be held. So if it be to testify in an indictment in this court, when that against the party named is in the *oyer* and *terminer*. Cause may be shown against a rule for an attachment by affidavit, the party not being bound to appear in person. *The People v. Van Wyck*, 324

66. An opinion of a plaintiff's attorney, that a cause on the day docket will not be brought on, will not, in future, be a reason for setting aside an inquest, taken in the absence of the defendant's attorney, though accompanied by a strong affidavit of merita. *Sayer v. Frack*, 336

67. If a person be admitted defendant in ejectment, and keep out of the way to avoid service of the *ca. ea.* against the casual ejector, the court will grant a rule to show cause why an attachment should not issue, of which service at the house of the de-

defendant will be sufficient. *Jackson, ex dem. Jackway, v. Stiles*, 368

68. To prevent a demurrer's being overruled as frivolous, there must appear a color for opposition: it is not enough for counsel to merely say he will oppose. When a reason for not noticing for the first day of term appears on the face of the record, there need not be any excuse shown by affidavit. *Kane v. Scofield*, 368

69. The court will on motion order a writ directing the judges of the common pleas to come in and acknowledge their seals to a bill of exceptions. *Pumroy v. Preston*, 373

70. In an action for use and occupation, the court will change the venue to the county where the house is, if all the defendant's witnesses reside there, and the plaintiff do not show he has any, as the action is founded on privity of contract, and is transitory in its nature. *Low v. Hallett*, 374

71. In a transitory action the defendant is entitled to change the venue to where his witnesses reside, unless the plaintiff show he has witnesses elsewhere. *Spencer v. Hulbert*, 374

72. In error on *certiorari* the costs of only the general assignment are to be allowed. If the error be from a clerical mistake in transcribing, and it be assigned for error, but the defendant do not apply to amend till after argument, it will not be allowed without payment of costs. *Wilber v. Day*, 375

73. If a public officer inform the court a decision in a cause is necessary for the peace of the people in any county, it will give such cause a priority. *Brandt, ex dem. Walton, v. Ogden*, 377

74. If an inquest be taken while the parties are endeavoring to compromise in consequence of a meeting appointed for that purpose, it will be set aside. *Brevort v. Sayre & Hurd*, 377

75. Motion on a frivolous plea, like that on a frivolous demurrer, has a priority. *Anonymous*, 377

76. A case is not ready for argument if the points be not in writing, and if only orally stated, the court will not suffer it to be brought on. *Steinbach v. O'Flynn*, 378

77. If a defendant petition the mayor and corporation of New York, for relief in a suit by them on a penal ordinance, during the pendency of which a default and judgment thereon

be entered, they will be set aside, especially if anything like merits appear. *The Mayor and Corporation of New York v. Comfort Sands*, 378

78. There may be judgment as in case of nonsuit for not proceeding to a second trial. A misapprehension of the practice on a point not settled will excuse from the usual costs on stipulating. *Patrick v. Hallett & Bowne*, 378

79. Though a cause has been on the day-docket in New York, yet the non-attendance of counsel to try it may, under circumstances, be an excuse for not allowing judgment as in case of nonsuit. *Rogers v. Garrison*, 379

80. If a defendant, before his time to plead be out, give notice of motion to change the venue, without obtaining an order to enlarge the time to plead or stay proceedings, and the plaintiff for want thereof enter a default, and go on to execute his writ of inquiry, he is regular; but if he do not attend to oppose the motion to set aside the proceedings, he waives his own regularity and the irregularity of the defendant, and the court will set aside the default and subsequent proceedings. *Ekhart v. Dearman*, 379

81. No motion can be made in a second term for costs to which a party moving was entitled in a former. *Palmer and others v. Mulligan*, 380

82. It is a good ground of opposition to a motion for a struck jury, that the affidavit on which it is made does not show wherein it is intricate or important. But if no opposition be made, it is then confessed. *Manhattan Company v. Lydig*, 380

83. If a defendant, after pleading the general issue, obtain his discharge under the insolvent law, and his attorney by mistake serve a notice of giving it in evidence at the trial, the court will, in a stale cause, give leave, on payment of costs, to strike out the notice and plead the special matter as a plea *puis darrein continuance*, but then the plaintiff will be at liberty to discontinue without costs. *Shaw v. Wilmerden*, 380

84. That a cause was not on the day docket for the sittings in New York is matter of excuse on a motion for judgment as in case of nonsuit, and must come from the plaintiff on affidavit. *Manhattan Company v. Brouwer*, 381

85. Motion for irregularity in a jury is a non-enumerated motion. *Smith v. Choatham*, 381

86. If an attorney, from sudden indisposition, cannot attend the execution of a writ of inquiry, the court will on terms set it aside, especially if the damages be excessive. *Koy v. Clough*, 381

87. The court will not allow an amendment in a justice's return in a point contradicted by the affidavit of the justice himself, especially if notice for argument on the errors assigned has been given after joinder. *Knapp v. Onderdonk*, 383

88. If circumstances tend to show a paper served by being put under a door has been received, the court will, unless the contrary appear, presume it has come to hand. *Anonymous*, 384

89. If a party has had an opportunity of examining a transient witness, want of his testimony is no cause for putting off a trial. Absence of counsel is an excuse for not going to trial which the court discountenances. *McKay v. Marine Insurance Company*, 384

90. The court will order a justice to amend his return by stating the evidence of a former trial for the same cause of action. *Feller v. Mulliner*, 384

91. After a verdict for the plaintiff, if he neglect to make up the record, the court will permit the defendant to do it; but if he apply to the court before request made to the plaintiff, costs of the motion will not be allowed on either side. *Jackson, ex dem. Kemp, v. Parker and Brewster*, 385

92. Where three months' advertising is required, a weekly notice is sufficient. *Anonymous*, 385

93. Trial by record is a non-enumerated motion. *McKenzie v. Wilson*, 385

94. If it appear diligence has been used to obtain the transcript in error, during a reasonable expectation of which a default has been entered for not assigning errors, it will be set aside on payment of costs. *Mitchell v. Ingersoll*, 385

95. A plea sent by the post will save a default. *Ludlow v. Heycraft*, 386

96. No trial by proviso to be had without a previous rule to be obtained on motion. *Codwise and others v. Hacker*, 386

See AMENDMENT; BILL OF EXCEPTIONS; DEMURRER; ERROR; EXE-

CUTION; IMPROVEMENTS; PARTNERS AND PARTNERSHIP, 1; PLEA AND PLEADING.

PREMIUM

See ACTION, 1; INSURANCE, 20.

PRESUMPTION.

See CERTIORARI, 1; EJECTMENT, 4; INSURANCE, 19; PRACTICE, 88.

PRIORITY AND PREFERENCE.

See PRACTICE, 27, 46, 73, 75.

PROMISSORY NOTE.

1. If a maker of a note cannot be found when it is due, evidence of *that* is sufficient to support the general averment that the note was presented, and payment refused. If the endorser of a note dated in New York, have a house there, and also one on York-Island, notice of non-payment left at his house in New York is good. If a holder of a note release one of several joint makers, excepting from such liability as he may be under to the endorsers, those endorsers cannot in an action against them by such holder, set up such release in discharge. If the endorser of a note die before it fall due, and the holder in an action against the executors state that the endorser promised in his lifetime to pay, it is fatal, and on such a count a recovery cannot be had. *R. & H. Stewart v. Eden and others*, 121

2. A note given as a collateral security for a judgment recovered, cannot, in the hands of a *bona fide* holder, be impeached on account of usury in the suit on which the judgment was recovered. *R. & H. Stewart v. Eden*, 150

3. A judgment recovered by the United States is a good consideration for a note to the district attorney, and not inquirable into in an action upon it by him, though satisfaction be not entered upon the judgment. A note given in the name of a firm for a private debt of one partner is void in the hands of the creditor, as against the firm, if given without the consent

of the partnership, and even as against a friendly endorser, endorsing at the request of the partner debtor, and not knowing the note was not given for a partnership debt. *Livingston v. Hastie and Patrick; The Same v. Tyrie*, 248

4. If a note fall due on a *Sunday*, payment must be demanded on the *Saturday*. An endorser of the promissory note of an insolvent is not chargeable without a previous demand on the maker, and notice, though the endorsement has been without any consideration, and merely to give currency to the paper. Notice to the endorser, if previous to a demand on the maker, is bad, though it be on the first day after the expiration of the days of grace. *Jackson v. Richards*, 343

5. A promissory note, payable on demand, if negotiated by the payee a long time after made, is, in the hands of the endorsee, subject to all equities to which it would have been liable in the hands of the payee himself. What shall be a reasonable time for demanding payment of a note payable on demand is, when the facts are agreed on, matter of law. If a debtor, for the benefit of all creditors, give to trustees a bond to the amount of all his debts, on which judgment is recovered, and he afterwards give a note to an individual creditor for the amount of his separate debt, such note will be satisfied by such creditor's discharging the debtor from execution on the judgment issued at the request of the creditor, and the assent of the trustees to the discharge will be implied. A plea in bar, admitting a note declared on, cannot depart from the *venue* in the declaration, and, therefore, need not give one. In all cases of demurrer, if it be not a frivolous one, the court will, even after judgment pronounced, give leave to withdraw it, and plead issuably, if asked for during the term in which judgment was given. *Furman v. Haslein*, 368

See ACTION, 1; CONSIDERATION, 1; PAYMENT, 2; PLEA AND PLEADING, 6.

PROMOTIONS.

Mr. Justice Kent to be Chief Justice, *vice* Lewis, Ch. J. elected Gover-

nor. Daniel D. Tompkins to be Judge.

PROPOSITION FOR INSURANCE.

See INSURANCE, 11.

PROTEST.

See CONSIDERATION, 1.

PUBLIC OFFICER.

See PRACTICE, 46.

PUIS DARREIN CONTINUANCE

See PRACTICE, 83.

PURCHASE.

See ATTORNEY, 1; INSURANCE, 17; SALE, 1.

PUTTING OFF TRIAL.

See PRACTICE, 36, 89.

Q

QUI TAM ACTION.

See ERROR, 2.

R

RECORD.

See PRACTICE, 91, 93.

RE-ENTRY.

See EJECTMENT, 4.

REFERENCE.

See PRACTICE, 51.

REGULÆ GENERALES.

1. As to admission of counsel, 261
2. For trial by proviso, 386
3. As to admission of counsel and oaths, 386, 387
4. As to costs in error in *certiorari*, 387

RELEASE.

See PROMISSORY NOTE, 1; WITNESS, 1.

RENEWING RULE.

See PRACTICE, 48.

RENT.

See EJECTMENT, 4; BANKRUPT, 1.

REPAIRS.

See INSURANCE, 7.

REPLICATION.

See PLEA AND PLEADING, 2.

REPRESENTATION.

See INSURANCE, 11, 13, 19.

RE-RESTITUTION.

See FORCIBLE ENTRY AND DETAINER, 1.

RESIDENCE.

See DESTROY, ABSCONDING AND ABSENT, 1.

RESIDUUM.

See DEVISE, 2.

RETURN OF WRIT.

1. A return by the deputy sheriff, in his own name, as deputy sheriff, is not a return by the sheriff. *Simonds v. Cuthin*, 61

See AMENDMENT, 2; CERTIORARI, 1,
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2; EXECUTION, 1; PRACTICE, 87, 90.

RULE TO SHOW CAUSE.

See PRACTICE, 55.

S

SAILING ON VOYAGES INSURED.

See INSURANCE, 8.

SALE.

1. Sale by the vendee, of goods purchased with his own promissory note at sixty days, and left in the possession of the vendor, who shows them as the vendee's, is good against one by the vendor subsequently made in consequence of the bankruptcy of the vendee, whose vendee may maintain trover for them, as the showing the goods by the vendor operated in favor of a *bona fide* purchaser as a delivery, and put an end to the transit. *Hunn v. Bowns*, 38

2. A sale of the proportion of one of the joint owners of a cargo, with the consent and advice of all the others, severs the tenancy in common, and the vendee may maintain trover for it against the other partners. *C. & J. Selden v. Hickock*, 166

See PAYMENT, 2; PRACTICE, 41; WARRANT, 1.

SATISFACTION.

See PROMISSORY NOTE, 5.

SEAL.

See BOND, 1; EVIDENCE, 2.

SEAWORTHINESS.

See INSURANCE, 7.

SEIZED AND SEISIN.

See CONSTRUCTION OF WORDS, 1

SERVICE.

See PRACTICE, 18, 67, 88.

SET-OFF.

1. In an action by assignees of a bankrupt, for money due their bankrupt as supercargo, the defendant cannot set off a claim against the bankrupt, for not keeping his vessel fully insured, the same being then unliquidated. *Brown v. Owing*, 33

2. Where there are joint and several suits against the same defendants, and costs allowed them in some, but damages assessed against one, in another, the costs allowed them in all may be set off against the damages recovered, but not against the costs in that suit, the plaintiff's attorney having a lien upon them. *Cole v. Grant*, 106

3. If an assuer know that a policy, though in the name of the broker, is in fact effected on account of another, a set-off of a debt due from the broker cannot be made in a suit by him, on that policy, though it be carried on in his own name. *Gordon v. Church*, 299

SEVERANCE.

See SALE, 2

SHERIFF.

See SHERIFF'S SALE, 1; RETURN OF WRIT, 1; EXECUTION, 1.

SHERIFF'S SALE.

1. A sheriff's sale is within the statute of frauds; an estate, therefore, will not pass by it, without deed or note in writing, signed by the sheriff. *Simonds v. Cullen*, 61

SHIPOWNER.

See INSURANCE, 15; MASTER OF SHIP, 1; SET-OFF, 1; WITNESS, 1.

SLANDER.

1. In an action for saying of another "he is perjured," it is enough to prove the words spoken, and that

they refer to the plaintiff. If it appear that they were spoken in an inferior or particular court, the competence of that court to administer an oath need not be proved, but its incompetence must appear from the defendant. *Green v. Long*, 91

SPECIAL PLEA.

See PLEA AND PLEADING, 2.

SPECIAL VERDICT.

See ADDITION, 1; PRACTICE, 28.

STAATS' PATENT.

1. Poplope's Kill, and four chains on each side of it, to a pond of water, over the mountains, and four chains round it, are in the grant of Staats' patent. The west line of Staats' patent is a line twenty chains from the river Hudson, from the north-west course of the patent to the head of the Assinnapainck, not in a straight line, but in such a line as that some part of the river may from every point of the line be within twenty chains, though other parts may be further from it. *Jackson, ex dem. Donaldson v. Lucet*, 363

STATUTE.

See EVIDENCE, 8.

STATUTE OF FRAUDS.

See EXECUTION, 1; SHERIFF'S SALE, 1.

STAYING PROCEEDINGS.

See PRACTICE, 24, 80.

STIPULATION.

See PRACTICE, 6, 7, 13, 20, 47, 78.

STRUCK JURY.

See PRACTICE, 1, 88.

SUBPOENA.

See PRACTICE, 12, 68.

SURPRISE.

See PRACTICE, 35.

SUPERCARGO.

See COMMISSIONS, 1; SET-OFF, 1.

T**TAKING TO GOODS.**

See INSURANCE, 2.

TAVERN.

See TRESPASS, 1.

TENANT.

See EJECTMENT, 2.

TENANTS IN COMMON.

1. Tenants in common may make a joint demise to try a cause in ejectment. *Jackson, ex dem. Van Denberg v. Bradt*, 169

See SALE, 2.

TENDER AND REFUSAL.

See PAYMENT, 2.

TESTATUM.

See PRACTICE, 9.

TEST OF WRIT.

See PRACTICE, 9.

TIME.

See DAY, 1.

TIME TO PLEAD.

See PRACTICE, 30.

TITLE.

See ALIEN POSSESSION, 2; CONVEYANCE, 1; EJECTMENT, 2; PLEA AND PLEADING, 1; WARRANT, 2.

TOLL.

See TURNPIKE ROADS, 1.

TRANSHIP.

See SALE, 1.

TRANSITORY ACTION.

See PRACTICE, 70, 71.

TRANSLATIONS.

1. All translations from foreign languages must be on oath; one by a consul is of no more validity than by any other respectable person. *Vandervoort and another v. Smith*, 155

TRAVERSE.

See FORCIBLE ENTRY AND DETAINER, 1.

TRESPASS.

1. On a joint plea in trespass, a separate justification cannot be gone into. If a tavern be kept in the house of a justice, and for his benefit, though the license be in the name of another, who also lives in the house, he is within the 20th section of the 104 act, and liable to trespass for issuing execution, as he has no jurisdiction, and if the plaintiff before him, and the constable join in pleading general issue, they will be liable also. *Schermhorn and others v. Tripp*, 168

2. In trespass in the common pleas, for running foul of the plaintiff's vessel, if he recover only six cents damages and six cents costs, he must pay costs to the defendant. *Van Cott v. Negus*, 235

3. In trespass *quare clauum, frogit*, by a father, for debauching and getting his daughter with child, *per quod*, &c., the grounds of the action are the loss

of service, and expenses of lying in; it is therefore no defence to show the daughter to be unchaste, unless the father has connived at her criminal intercourse. *Ackerley v. Haines*, 293

See PLEA AND PLEADING, 1, 5; PRACTICE, 42.

TRIAL.

See PRACTICE, 5, 36, 46.

TRIAL BY PROVISIO.

See PRACTICE, 96.

TROVER.

See INSURANCE, 17; SALE, 1, 2.

TRUST AND TRUSTEE.

See PROMISSORY NOTE, 5.

TURNPIKE ROADS.

1. A person riding through a gate of the Columbia turnpike and not paying toll is not liable to the penalty of the ninth section, unless it be accompanied with force and violence. *President and Directors of the Columbian Turnpike v. Woodworth*, 97

U

USE AND OCCUPATION.

See PRACTICE, 70.

USURY.

See PROMISSORY NOTE, 2; ACTION, 1.

V

VACATING RULES.

See PRACTICE, 49, 53, 55.

VAN SLYCK PATENT.

1. The line run by old Isaac Vroman, is the true line of the Van Slyck patent. Original locations of patents are of great weight in settling boundaries. *Van Slyck v. Vedder*, 210

VARIANCE.

See ERROR, 2.

VENIRE.

See ERROR, 2.

VENIRE TAM QUAM.

See PRACTICE, 64.

VENUE.

See LABEL, 2; PRACTICE, 4, 9, 70, 71; PROMISSORY NOTE, 5.

VERDICT.

See PRACTICE, 44.

VOID POLICY.

See INSURANCE

W

WAGES AND PROVISIONS.

See INSURANCE, 15, 16.

WAIVER.

See ERROR, 2; PRACTICE, 80.

WARRANT.

See JUSTICE OF THE PEACE, 1, 2.

WARRANT OF ATTORNEY.

See PARTNERS AND PARTNERSHIP, 1; PRACTICE, 54.

WARRANTY.

1. In an action on the case for selling one article for another, there must be either a warranty or fraud; a sound price does not imply a warranty of soundness. The description in a bill of parcels is no warranty.

Seixas v. Woods, 48

2. The words "grant, bargain, sell, alien, and confirm," in a conveyance in fee, do not imply a covenant. It is implied only by the word "deck," or "give." *Frost and others v. Raymond,* 188

3. On a written warranty that a negro is sound, parol proof is admissible to show that at the time of sale, the vendor informed the vendee of a defect. A warranty does not extend to defects which are visible. *Schuyler v. Russ,* 202

See INSURANCE, 6, 8, 13; PRACTICE, 41.

WEIGHT.

See INSURANCE, 3.

WIFE.

See ERROR, 3.

WILL.

See DEVISE, 1; EVIDENCE, 4, 5.

WITHDRAWING A JUROR.

See PRACTICE, 26, 63.

WITNESS.

1. A master of a ship who has drawn a bill on his owner for the amount of money advanced to him to pay exporting duties on a cargo delivered to his owner, and to enable him to return home with his vessel, is a competent witness, without a release, in an action by the person lending the money against the owner, though the bill be unaccepted, as he is equally liable to both parties. *Milward v. Hallett,* 77

2. If a witness refer to papers in his depositions, they may be produced on a trial to refresh his memory. *Steinbach v. Columbian Insurance Company,* 29

See PRACTICE, 10, 12, 13, 15, 35, 38, 39.

WRIT.

See RETURN OF WRIT, 1; ERROR, 2.

WORDS.

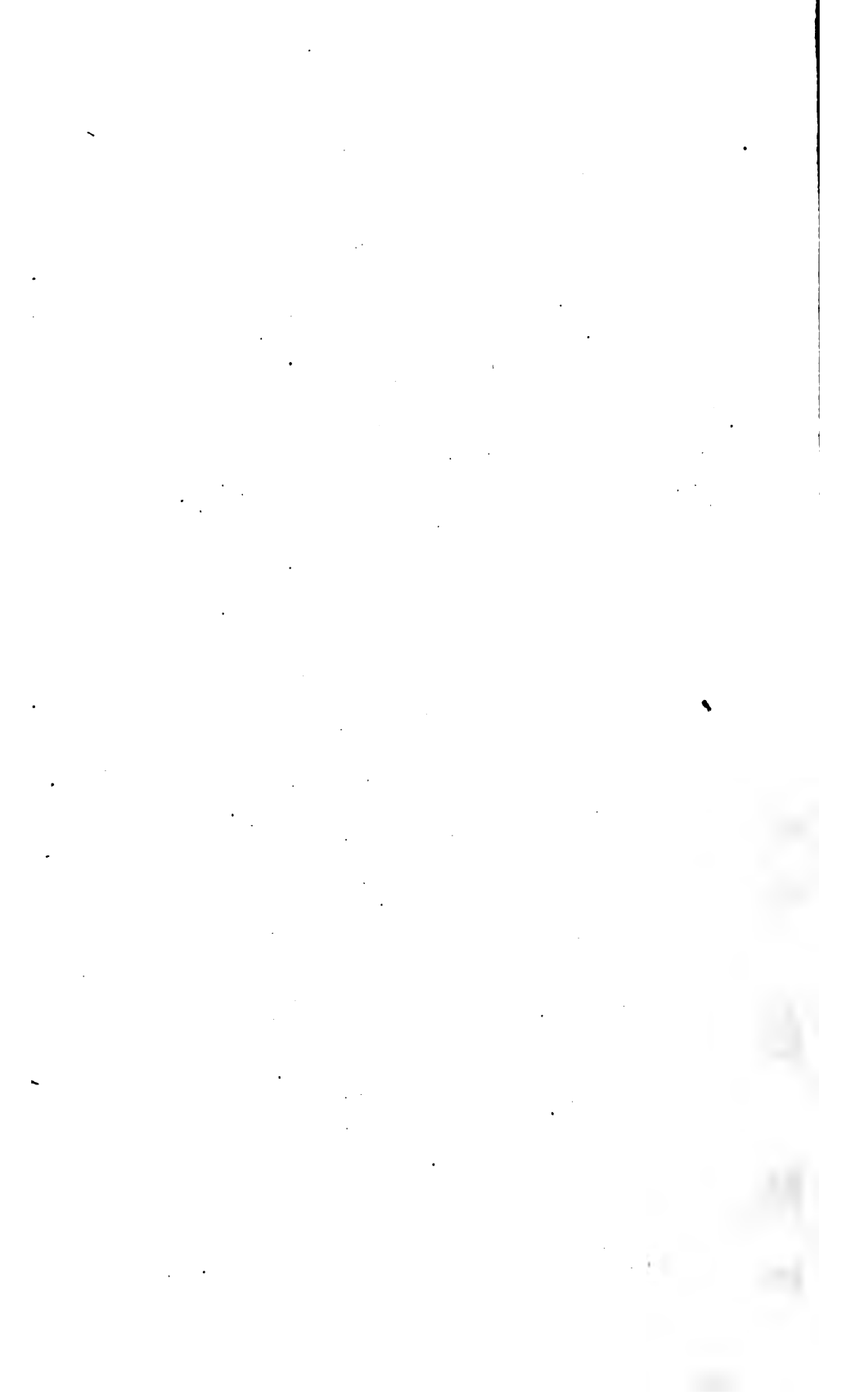
See SLANDER; CONSTRUCTION OF WORDS.

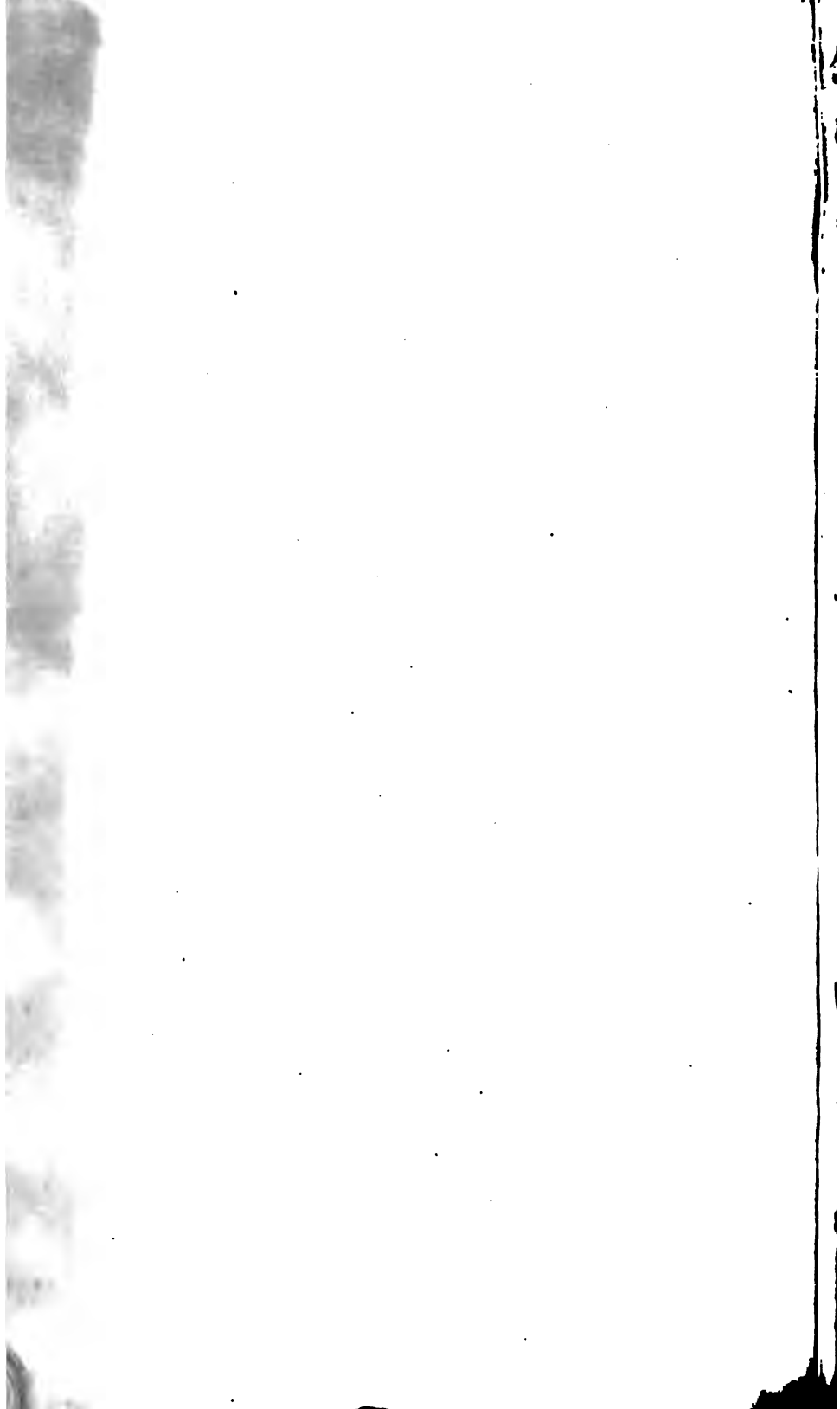














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